CLERK'S COPY

91-400

United States

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED, PETITIONER,

vs.

FRANCIS L. HAWES, INDIVIDUALLY AND AS TRUSTEE AND RAYMOND D. EVANS, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA

Docket Entries

(Civil Action No. 5003)

Date 1940		Proceedings
May	7.	Deft's findings of fact & conclusions of law signed. Goldsborough, J.
"	7.	Pltf. findings of fact & conclusions of law filed.
"	7.	Decree dismissing suit. Goldsborough, J.
June	3.	Notice of Appeal by Plff. (notice of Appeal. Copy mailed to Hawes et al. & Miller et al. by Clerk) filed.
"	"	Deposit by Johnson Jr. Clerks Cost on Appeal. Deposits, $5; Fees, $5; Total, $5.
"	6.	Motion to enter judgment & direct clerk to notify parties. Notice P & A filed.
"	6.	Points & Authorities of Def't #1 filed.
"	7.	Amended Points & authorities in opposition to motion to enter judgment and direct clerk to notify parties; exhibit A.
"	13.	Order vacating jdgt. of 5/7/40 (2 notified). Goldsborough, J.
"	"	Judgment dismissing cause (2 notified). Goldsborough, J.
"	14.	Notice of Appeal by Plff. (Notice Mailed to Hawes & Miller, by Clerk.)
"	24.	Motion of Deft. #1 to reconsider order to vacate Judgment. Notice, Service, Affidavit, Exh. (1) & P. & A. filed.
"	"	Order dismissing motion to enter judgt. O'Donoghue, J. (n).
July	23.	Motion of plaintiff to extend time for filing transcript.
"	"	Order extending time 90 days from June 14/40 for filing transcript of record in Court of Appeals. Laws, J. (n).
Aug.	22.	Bond for $250.00 with U. S. Fidelity and Guaranty Co., Surety Approved. Pine, J.

Sept. 9. Designation of record & Assignment of error filed.
" 16. Appearance Gunion for Deft. Hawes filed.
" 17. Narrative Statement of testimony & Copy filed.
" 19. Appellee's designation of additional portions of the record, proceedings and evidence filed.
" 23. Motion to strike Plaintiffs Narrative Statement for record on Appeal & Points & Authorities filed.
" 26. Order U. S. Court of Appeals extending time to 10/9/40 to file record filed.
" 26. Additional P. & A. in support of mo. to reconsider etc. filed.
" 27. Praecipe withdrawing deft's mo. to strike pltf. narrative statement filed.
" " Mo. to strike certain portions of pltf. designation of record with P. & A. filed.

[fol. 10b]

Oct. 11. Time to file record in Ct. of Appeals ext. to Nov. 7. Copy Order filed.
" 31. Mo. to strike etc. overruled in part and granted as to requiring pltf. to substitute testimony in Q. and A. form. Goldsborough, J.
Nov. 18. Time to file record in C. A. ext. to Dec. 4 filed.
Dec. 13. Time to file record in C. A. ext. to Dec. 30, 1940 filed.
" 31. Motion to send original exhibits to appellate court in lieu of copies. P. & A. notice filed.

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Jan. 7. Opposition to motion to send original exhibits to appellate court in lieu of copies thereof—motion to require pltf. to file question & answer form of testimony as required by order of court filed.
" " Motion to require H. L. Johnson to show authority to further act as attorney in these proceedings filed.
" " Motion to require Pltf. to submit order showing that court has acted on motion to reconsider order to vacate judgment, filed.
" 16. Order U. S. Court of Appeals for D. C. extending time to 2/1/41, to file record, filed.
" 23. Transcript of shorthand report of testimony (in Dup.) filed.

Jan. 23. Order for original exhibits to be transmitted to U. S. Ct. of Appeals etc. Goldsborough, J. (n).
" 30. Cert. of counsel as to accuracy and identity of copies of transcript of record filed.
Feb. 12. Order U. S. Court of Appeals for D. C. extending time to 3/3/41, to file record, filed.
" 19. Plaintiffs exhibits (7) filed.
" 24. Exhibit of plaintiff (Deed of Trust) filed.
" 25. Stipulation of Counsel as to motion of 6/6/40, filed.
" 28. Motion to require plaintiff to pay defendant for the use of defendants transcript, Notice, P. & A. & Exhibits (3) filed.
March 3. Exhibit filed.
" " Transcript of Record to Johnson, Jr. & Dept. Deposits, $19.45; Fees, $19.45; Total, $19.45.
" 24. Order taxing costs of Court Stenographer. Goldsborough J. (n).
May 12. Cert. of Clerk concerning absence of motions & Dep. by Gunion. Deposits, .50; Fees, .50; Total, .50.

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Aug. 4. Order of Ct. of Appeals for transmittal of supplemental record showing docket entries made on and after May 7, 1940, filed.

[fols. 10c-11] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

PRETRIAL PROCEEDINGS—Filed March 19, 1940

Statement of Nature of Case:

Bill to release and cancel a second deed of trust held by defendant Francis L. Hawes, and for an accounting. Plain-
[fols. 13-22] tiff claims that by reason of usurious transactions with defendant Hawes, she has paid to the said Hawes an amount in ex-ess of any lawful obligation which she assumed by reason of payments to her, and accordingly that defendant is liable to account to her for such excess payments. Defendant maintains that first, he purchased

the second trust not of plaintiff but from a party represented by an agent, and that the said defendant did not make a loan to the plaintiff so that there was no usury involved; second, that the plaintiff is not entitled to maintain this suit because she has been and now is in default of obligations due under the note, whether such obligations are in the face amount of the note, or consist of the amount ac-ually advanced her; third, that by reason of plaintiff having become the real purchaser, acting under or through a straw party, in a foreclosure under the second trust, she waived any claim of wrongful act in connection with said trust; and further is estopped; fourth, that in 1929, plaintiff brought about an illegal foreclosure for the express purpose of depriving her husband of any claim in the property and that, therefore, having engaged in an illegal act, should not be granted any relief in a Court of Equity.

Defendant is given five days in which to amend in order to claim laches, as an additional defense.

Stipulations:

Parties stipulate that certain documents bearing initials of the Court, may be received in evidence without formal proof.

Attorneys authorized to act:

H. J. Johnson, Jr., *Plaintiff*.
Herman Miller and Katherine Hawes, *Defendant*.

Dated—March 19, 1940.

Bolitha J. Laws, *Presiding Judge*.

* * * * * * *

[fol. 22a] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Defendants

DECREE DISMISSING SUIT—Filed May 7, 1940

This action came on to be heard at this term: and thereupon, upon consideration thereof, it is, this 7th day of May, 1940, adjudged as follows:

1. That the bill of complaint filed herein be and the same is hereby dismissed.

2. That the tender of resignation as trustee by the defendant, Francis L. Hawes, be accepted, and Raymond D. Evans be and is hereby appointed substitute and sole trustee.

3. That costs of suit be taxed against the plaintiff.

T. Allan Goldsborough, Justice.

DOCKET ENTRY

1940, May 7. Decree dismissing suit, Goldsborough, J., filed.

[fol. 22b] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES, et al., Defendants

NOTICE OF APPEAL—Filed June 3, 1940

Notice is hereby given this 3rd day of June, 1940, that Bertha Byrd, plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the

judgment of this Court entered on the 7th day of May, 1940 in favor of Francis L. Hawes and Raymond D. Evans, defendants against said Bertha Byrd, plaintiff.

Henry Lincoln Johnson, Jr., Attorney for Plaintiff, 615 F St., N. W.

Notice to: Katherine Hawes, attorney for defendant Francis L. Hawes, Southern Bldg. Herman Miller, attorney for defendant Raymond D. Evans, No. 1. Thomas Circle, N. W.

[fol. 22c] DISTRICT COURT OF UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES, et al., Defendants

MOTION TO ENTER JUDGMENT AND DIRECT CLERK TO NOTIFY PARTIES—Filed June 6, 1940

Now comes the plaintiff in the above entitled cause, by her attorney, and moves the court to direct the clerk to enter the judgment in the above entitled cause and to notify the parties to this cause of the date and fact of such entry, and for reason therefore assigns as follows:

1. That the clerk of the court has failed to enter the day or month of the judgment of this court as is required by the rules of this court.

2. That the clerk of this court has failed to notify the parties to this cause of the action of the court in this cause.

3. For other reasons apparent upon the fact of the record.

(Signed) Henry Lincoln Johnson, Jr., Attorney for Plaintiff.

Henry Lincoln Johnson, Jr., 615 F Street, N. W., District 8000, Attorney at Law.

[fol. 22d] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action, No. 5003

BERTHA BYRD, 616 K St. N. W., Plaintiff,

vs.

FRANCES L. HAWES, Individually and as Trustee, Southern Building and Raymond D. Evans, 925 New York Ave. N. W., Defendants

ORDER TO VACATE JUDGMENT—Filed June 13, 1940

It is this 13th day of June, 1940, ordered and adjudged that the judgment entered, in the above entitled cause, filed May 7, 1940, be vacated for the reason that the clerk failed under Rule 77 d. of the Rules of Civil Procedure to serve a notice of the entry of judgment by mail on the plaintiff in the above entitled cause, and to make a note in the docket of the mailing.

T. Allan Goldsborough, Justice.

[fol. 23] IN UNITED STATES DISTRICT COURT

* * * * * * *

JUDGMENT—June 13, 1940

Upon consideration of the pleadings, exhibits and testimony adduced in open Court, it is this 13th day of June, 1940 Ordered and Adjudged:

(1) That the bill of complaint filed herein be and the same is hereby dismissed.

(2) That the tender of resignation as trustee by the defendant, Francis L. Hawes, be accepted, and Raymond D. Evans be and is hereby appointed substitute and sole trustee.

(3) That costs of suit be taxed against the plaintiff.

T. Allan Goldsborough, Justice.

* * * * * * *

[fol. 24a] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil No. 5003

BERTHA BYRD Plaintiff.

vs.

FRANCIS L. HAWES, et al., Defendants

NOTICE OF APPEAL—Filed June 14, 1940

Notice is hereby given this 14th day of June, 1940, that Bertha Byrd, plaintiff herein hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of June, 1940 in favor of defendants, Francis L. Hawes and Raymond D. Evans against said plaintiff, Bertha Byrd.

Henry Lincoln Johnson, Jr. Attorney for Plaintiff
615 F. St., N. W.

Notice to: Katherine Hawes, Attorney for defendant Francis L. Hawes, Southern Building, Herman Miller, Attorney for defendant Raymond D. Evans, No. 1 Thomas Circle, N. W.

[fol. 24b] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Defendants

MOTION TO RECONSIDER ORDER TO VACATE JUDGMENT—Filed June 24, 1940

The defendant, Francis L. Hawes, moves the court to reconsider its Order to Vacate Judgment upon the following grounds:

1. That the plaintiff, Bertha Byrd, has been properly notified of the entry of the final decree on May 7, 1940 by reason of the following:

a. That notice of the entry of the final decree on May 7, 1940 was written up for mailing, as is more par-

ticularly set forth in the Affidavit of Paul A. Dawson, Assistant Clerk, attached hereto and made a part hereof, and that such notices are customarily mailed forthwith as required by Rule 73 (d) of the Federal Rules of Civil Procedure.

* * * * * * * *

[fol. 24c] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS, Defendants.

AFFIDAVIT—Filed June 24, 1940

DISTRICT OF COLUMBIA, ss:

I, Paul A. Dawson, being first duly sworn according to law, depose and say that I am an Assistant Clerk of the District Court of the United States for the District of Columbia, acting as Clerk for Civil Division No. 3; and that I personally made a notation on the Day Book of Civil Division No. 3 of a large letter "N" beside the entry of the final decree in the above-entitled cause, and that said "N" shows that notice of the entry of the final decree was written up for mailing to the parties herein.

Paul A. Dawson.

Subscribed and sworn to before me this 20th day of June, 1940.

Geo. P. Newton.

[fols. 24-d-47] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS, Defendants.

ORDER DISMISSING MOTION

This cause came on to be further heard: and thereupon, upon consideration thereof, it is, this 24th day of June, 1940, adjudged as follows:

That the Motion to Enter Judgment and Direct Clerk to Notify Parties be, and the same is, hereby dismissed.

Daniel W. O'Donoghue, Justice.

[fol. 48] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Appellant,

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellees

MOTION TO DISMISS

Appellee, Francis L. Hawes, moves the Court to dismiss the appeal for the following reasons:

A. *For Failure to Note Appeal Within Time*

1. The appellant failed to file a notice of appeal within twenty days from the entry of judgment; a notice of appeal was not filed until June 3, 1940, (page 37 of the record) more than the twenty days allowed by Rule Number 10 of the Rules of the United States Court of Appeals for the District of Columbia with amendments to December 16, 1936, in effect at that time. The record in this case, docketed March 3, 1941, discloses that the lower Court entered a final judgment dismissing the suit on May 7, 1940, (page 36 of the record) and the docket entry of the filing of the judgment was made by the Clerk of the District Court on May 7, 1940, (page 36 of the record).

2. Appellant in an attempt to gain more time within which to note an appeal filed a motion in the District Court to enter judgment and direct the Clerk to notify parties, (page 38 of the record) on June 6, 1940, more than [fol. 49] twenty days after the entry of the final judgment on May 7, 1940, which was opposed by the appellee in amended points and authorities filed in answer to this motion on June 7, 1940, (page 39 of the record). This motion was subsequently dismissed by an order of the Court, June 24, 1940, (page 49 of the record).

3. The District Court, however, in order to give appellant an opportunity to note an appeal, entered an order vacating the judgment of May 7, 1940, on the grounds that

the Clerk failed to serve a notice of the entry of the judgment by mail on the plaintiff, and to make a note in the docket of the mailing (page 42 of the record). This order was filed on June 13, 1940, more than twenty days after the final judgment entered on May 7, 1940, being 37 days later. The Court then filed on June 13, the same day, a judgment different in form but identical in substance to that filed on May 7, 1940, (page 41 of the record) more than twenty days after the entry on the docket of the judgment of May 7, 1940. This was a violation of Rule 6 (b) of the Federal Rules of Civil Procedure, which provides that various periods of time for the doing of an act at or within a specified time may be enlarged before the expiration of the time and even after expiration of the time where there is excusable neglect. But this rule specifically provides that the Court may not enlarge the period for taking an appeal as provided by law. This would apply whether the neglect was excusable or inexcusable. This was also in disregard of the guide to the bar and to the Courts in the case of *Burke* v. *Canfield*, 72 App. D. C. 127, 111 Fed. 2d 526, which held that infinite mischief has been produced in overlooking errors of form and prosecuting appeals in violation of the rules. (See *Wilson Co.* v. *Ward*, Vol. 69 W. L. R. 489, an opinion concerning Rule 6 (b) by Justice Luhring.) No [fol. 50] application by motion or notice for this order of vacation was made either before or after the expiration of the twenty-day period from May 7, 1940, for noting an appeal. (See certificate of the Clerk attached hereto as Exhibit A.)

4. The notation of the judgment in the Civil Docket on May 7, 1940, (page 36 of the record) as provided in Rule 79 (a) and Rule 58 of the Federal Rules of Civil Procedure constituted the entry of the judgment and the time from which it became effective for all purposes. A judgment is effective on its entry not the time of service of notice of the entry. The time for taking an appeal cannot be extended for failure to serve notice of the entry of the judgment on the parties.

Siegel vs. *Margiotta*, 102 Fed. 2d 525. The Court stated the law to be as follows:

"* * * It has always been the uniform custom in federal courts so far as we know to make the time to appeal begin with the entry of the judgment, not with its service

upon the putative appellant; that the New Rules of Civil Procedure (28 U. S. C. A. following section 723 c) have not changed. *Thus the Appellant must at this risk keep watch upon the entry of an order.*" (Underlining supplied.)

5. Appellant subsequently filed another notice of appeal on June 14, 1940, (page 43 of the record) more than twenty days after the final judgment entered by the lower Court on May 7, 1940, being 38 days later.

6. Appellee filed a motion in District Court on June 24, 1940, to reconsider the order to vacate the judgment (page 44 of the record) with an attached affidavit and exhibit (page 47 and page 48 of the record) which motion, affidavit and exhibit disclose that the appellant had notice or should have had notice of the entry of the decree of May 7, 1940, and that the Clerk of the District Court entered in his Civil [fol. 51] Order Book a note of the mailing of the notice of entry of the judgment. Inasmuch as no order overruling this motion has been entered (See attached certificate of the Clerk of the District Court, Exhibit A) appellee offers the explanation to the Court of Appeals that the Court below did overrule said motion stating that it did not wish to cut off any person from an appeal, and that Appellee's attorney (See certificate, Exhibit B) did draw up an order overruling said motion when it became evident that the record was remaining incomplete and did present this order to Appellant's attorney, for signing and filing.

7. In reliance upon the absolute wording of Rule 6 (b) and in good faith believing the cause herein to have terminated, Francis L. Hawes, the appellee, instructed the trustee of the second trust to proceed with foreclosure proceedings against the property in suit, and proceedings were held more than twenty days after the final decree of May 7, 1940, on June 4, 1940. As is fully set out in the attached affidavit of Francis L. Hawes, Exhibit C, the real property involved in suit had brought no income to either first or second trust holders since April 20, 1939, and had depreciated in value because of lack of repairs. Because of threatened first trust foreclosure, defendant was in haste to foreclose under his subsequent lien. The foreclosure sale of June 4, 1940, resulted in a purchase by J. Oliver Hill, as agent for Bertha Byrd, who failed to go through with the sale. This default resulted in a foreclosure, August 9, 1940, under the first trust and a wiping out of the

second trust. This attempted foreclosure sale under the second trust placed defendant in an anomalous position, to say the least, for it was held before the entry of the judgment of June 13, 1940.

[fol. 52] 8. Not only has the mandate of the law contained in Rule 6 (b) of the Federal Rules of Civil Procedure been violated but constant delays and violations of other Rules of the Courts present a total result in direct opposition to the spirit and purpose of the Rules of any Court. (See attached affidavit of Katherine N. Hawes, Exhibit D.) "Infinite mischief" has resulted.

9. Other delays are with restraint here noted. It is a matter of record that numerous extensions of time have been granted appellant in the District Court and the Court of Appeals and that he was late in filing his brief and asking for an extension of time therefor, the net result being that approximately ten months elapsed since May 7, 1940, before the docketing of this appeal on March 3, 1941, and approximately one year before the filing or service of any brief by appellant.

10. It is a well recognized policy of the law to prohibit and prevent continuously delayed litigation of an issue after litigants have had their day in Court and have been afforded due process of law. This policy is strictly enforced in order that society may not be continuously stirred up and harassed by long-continued, uncertain litigation, the continuance of which is more detrimental to litigants and society than any alleged original grievance of one member of society against another. The constant and continuous failure of attorneys and Courts to comply with the rules of Court results in an onerous burden to the litigants, involved and to society as a whole, and the appellee in this case has felt the full weight of this burden.

B. *Because Relief Asked By Appellant Is Moot*

1. The second trust of Bertha Byrd to Francis L. Hawes dated July 1, 1929, has been wiped out by the foreclosure of [fol. 53] the trust from Bertha Byrd to Arms and Drury, dated June 14, 1926, which sale held August 9, 1940, and the purchase thereat by Georgie H. Kelly as agent for Francis L. Hawes was upheld by the District Court of the United States for the District of Columbia in the case of *Bertha*

Byrd vs. *National Valley Bank of Staunton and Francis L. Hawes*, Civil Action Number 8290, relevant parts of which are attached hereto as Exhibit E.

2. Georgie H. Kelly acting as agent for Francis L. Hawes, appellee, has been given judgment for possession of the premises in the case of *Georgie H. Kelly* vs. *Byrd, et al.*, in the Municipal Court of the District of Columbia, Landlord and Tenant Branch, Number 899878. A record of this protracted litigation is attached hereto as Exhibit F.

3. Reference is also made to the grounds stated in Part C of this motion.

C. *For Lack of Statutory Right of Personal Representative to Recover Usury*

1. The claims of appellant rise or fall on the question of the right to recover usury. (See appellant's brief.)

2. This Court has recognized the death of Bertha Byrd, the appellant, on December 4, 1940, by its order of April 26, 1941, substituting her administrator herein.

3. The usury statute of the District of Columbia does not give the right to recover usury to a personal representative of the party paying the usury.

4. In the case at bar Bertha Byrd alone was entitled to receive the benefit of our usury statute for any usury she may have paid during her lifetime. Her rights in this regard have abated with her death.

[fol. 54] *Citation of Authorities for Ground C*

The Code of the District of Columbia, 1924, Section 1181, and the Code of the District of Columbia, 1929, Title 17, Chapter 1, Section 4, limits the recovery of usury paid to the person paying the same. Although usury statutes in many of the states provide that the person paying usury or his personal or legal representative may recover and this was formerly the case in the Disrtict of Columbia (See *Kendall v. Vanderlip*, 2 Mackey (D. C.) 105, and *Phillips v. Ogle*, 21 D. C. 199, p. 207, involving Chapter 32, Sec. 4, District of Columbia, U. S. Compiled Statutes in Force 1889—Torberts Lovejoy) our present usury statute does not contain the provision that the personal representative may recover.

This present statute has its origin in the first District of Columbia Code approved March 3, 1901. Research in the Congressional Library fails to reveal any committee hearings or Congressional debate on the interest and usury code sections. The assumption must be that Congress intentionally deleted the provision for recovery of usury by the personal representative and confined the right to the penalty to the person actually paying the usury. A specific statute in derogation of the common law cannot be extended by implication to include persons who do not come within its terms. *Wood v. White*, 97 Fed. (2d) 646, 68 App. D. C. 341; *De Ruiz v. De Ruiz*, 66 App. D. C. 370, 88 Fed. (2d) 752.

In *Garris v. Thomas*, 66 So. C. 57, 44 S. E. 374, the Court said, concerning its usury statute of 1877-1878, that nowhere by its terms did it empower an executor, administrator or the heirs at law or assigns of a deceased person to recover usury, that the law which denounced usury made the punishment thereof a penalty or forfeiture, was personal to the debtor and died with him, that it did not survive [fol. 55] to his assignee or personal representative. The Court found that a later South Carolina usury statute allowing a personal representative to recover did not apply to this earlier transaction. The situation in the District of Columbia is reversed. We once had a law permitting the personal representative to recover usury, but now our law merely empowers the person paying the usury to recover the penalty of all interest paid.

In *Allen v. Petty*, 58 So. C. 240, 36 S. E. 586, citing *McBroom v. Scottish Investment Co.*, 153 U. S. 318, for the point that the Court cannot allow a penalty which is not to be found in the statute, the Court held, in discussing an early South Carolina usury statute, that a counterclaim based upon a statutory remedy for the recovery of usury was in the nature of a penalty and did not survive the death of the party making such counterclaim.

"Usury is, of course, merely a statutory offense . . ." *Missouri, Kansas and Texas Trust Company v. Krumseig*, 172 U. S. 351, p. 355, 19 S. C. 179, 43 L. Ed. 474. Usury statutes are penal in nature, usury being *mala prohibita*, and the right to recover the same is a remedy existing by virtue of statute alone, which does not give a vested right of recovery as a property interest; it may be revoked at will

by the legislature, *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682, 2 S. C. 371. Usury statutes confer a special right of action to recover interest unknown to the common law, *Kurzman, et al. v. Commercial Credit Co.*, 33 Fed. (2d) 358. In *Alston v. American Mortgage Co.*, 157 N. E. 374, 116 Ohio St. 643, the Court stated that we must keep in mind that at common law parties were entitled to make any contract for interest charges, without limit, and that all usury statutes are in derogation of the common law and a restric-
[fol. 56] tion upon the freedom of contract. An old District of Columbia usury statute provided that any rate of interest could be charged that was agreed to by the parties in writing. Usury statutes must be strictly construed.

An action to recover usury abates on the death of the person paying the same. It is in the nature of a tort action given by statute to the person paying it to redress a wrong personal to himself. This proposition is discussed fully in the case of *Charles La Fountain v. Burlington Savings Bank*, 56 Vermont 332, a case in which the usury statute did not give the right to recover usury to any one but the person paying the same, the Court acknowledging that the usury statutes of other states may provide that the person paying usury or his personal representative may recover.

Respectfully submitted, John B. Gunion, Attorney for Appellee, Francis L. Hawes, 1420 New York Avenue, N. W.

I hereby certify that service of the above motion and citation of authorities and exhibits was made on Henry Lincoln Johnson, Attorney for Appellant, 615 F Street, N. W.

By:

1. Delivery to him.
2. Delivery to a person in charge of his office.
3. Leaving it in a conspicuous place in the office.
4. Mail, registered, June 4, 1941.

John B. Gunion.

[fol. 57] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jul. 11, 1941. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7844

J. OLIVER HILL, Administrator of the Estate of Berthat Byrd, Appellant,

versus

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellee

Opposition to Motion to Dismiss

A. *Failure to Note Appeal Within Time*

It is respectfully submitted that the appeal in this cause was taken within time. It is true that the first notice of appeal was not filed until June 3, 1940, however, under the pertinent rules, their language, purpose and intent, the reason for the vacation of the order of May 7, 1940, and the passing and entry of the order of June 13, 1940, clearly appears. Perhaps the chronological sequence of events prior to the entry of the order of June 13, 1940, and the termination of the hearing of the cause in April 1940, is necessary to clearly present the picture.

This cause was heard in open court, upon the merits, and after argument by counsel, the court, on or about April 18, 1940, decided the cause and requested an order, findings of fact and conclusions of law consistent therewith. Counsel for both parties prepared their versions of these papers which were submitted to the court, on or about April 19, 1940. The Court took the matter of determining which, if any, he would sign under advisement. On May 7, 1940, in chambers, out of the presence of counsel or parties, and without notice thereof, the Court signed the order of May 7, 1940. Neither the then living appellant nor her counsel received any notice thereof, but, through coincidence, became aware of the action of the Court on June 3, 1940, when, and on the same day, counsel filed the Notice of Appeal, dated June 3, 1940. Subsequently and on June 6, 1940 appellant filed a motion to vacate (R. Pg. 38), to which

appellee filed opposing points, and upon which a hearing was had. However, the Court of its own motion, it appear- [fol. 58] ing that the clerk had neglected to notify counsel or appellant of the entry of judgment as required by Rule 77 (d) of the New Rules, vacated the judgment of May 7, 1940, and signed the order of June 13, 1940.

Perhaps a review of the state of the rules at the time that this matter was determined is essential. Prior to the New Rules, the Equity Rules provided as follows: (Supreme Court Rules for Courts of Equity)

Rule 4

Notice of Orders

Neither the notice of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to and in the absence of, a party the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be taken as sufficient proof of due notice of the order.

Under the New Rule this rule was substantially reiterated in Rule 77(d) which provides as follows:

(d) Notice of Orders or Judgments. Immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of entry of an order is required by these rules;

Prior to June 3, 1940, your appellant had never had such notice, nor did the clerk make such note of mailing in the docket. Although the rules of the Court of Appeals at the time of the appeal provided that the appeal shall be taken within 20 days of the day when the judgment is "made or pronounced", of old Rule 10, your appellant suggests that "made or pronounced" must be considered in the light of the old rules, Rule 4, Supra; rather than the new rule 10 promulgated February 1, 1941, which incidently conforms

to the New Rules by requiring the notice to appeal within 30 days of Entry of the judgment.

It is suggested that the application of old Rule 10 prior to February 1, 1941, must be considered in the light of Rule 77d, supra and also perhaps in the light of the provisions [fol. 59] of Rule 6 (e), Rules of Civil Procedure.

Furthermore appellee is attempting to review the judgment of the lower court here, by motion, without noting an appeal therefrom or otherwise conforming to the rules of this court or the court below. This is highly irregular and improper.

B.

Because Relief Asked by Appellant Is Moot

Just why appellee suggests the recovery of usury paid, is moot because a lien securing the usurious note has been foreclosed upon is beyond your appellant.

C.

The Right of the Personal Representative to Prosecute this Case

The movant cites several cases in support of the "personal" character of the defense of usury, and several old case- interpreting statutes of other jurisdiction. No attempt will be made in this answer to reply to such cases except by way of indicating that the statutory peculiarities of other jurisdictions are of small moment in light of the clear and uncontroverted statutory provision now in force in the District of Columbia.

Movant cited Chapter 32 Sec. 4 of Compiled Statutes D. C. (Albert and Lovejoy, 1894), otherwise described as R. S. D. C. 716, and 16 States 91, 92, (April 22, 1870). This statute in words and figures provides as follows:

If any person or corporation within the District shall directly or indirectly take or receive any greater amount of interest than is provided for in this chapter, upon any contract or agreement whatever, it shall be lawful for the person, *or his personal representative*, or the corporation paying the same, to sue for and recover all the interest paid from any such contract or agreement *from the person or his personal repesentative* or from the corporation receiving such unlawful interest; but the suit to recover back such

interest shall be brought within one year after such unlawful interest shall have been paid or taken.

[fol. 60] The new statute, Section 1181, 1901 Code, 1911 Code, 1924 Code, and Title 17 Chapter 1 Section 4, was passed on March 3, 1901, 31 stat. 1377, Chapter 854 is as follows:

If any person or corporation in the District shall directly or indirectly take or receive any greater amount of interest than is herein declared to be lawful, whether in advance or not, the person or corporation paying the same shall be entitled to sue for and recover the amount of the unlawful interest so paid from the person or corporation receiving the same, provided said suit be begun within one year from the date of such payment.

It is apparent that, among other changes the words "or his personal representative" has been omitted.

However, at the same time, on the same day, and, in the same enactment, Congress included provisions which otherwise provided for the suit by the personal representative. In Title 24, Sec. 31, March 3, 1901, 31 Stat. 1227, C 854 (Sect. 235) the following provision was set out.

On the death of any person in whose favor or against whom a right of action may have accrued for any cause except in injury to the person or to the reputation, said right of action shall survive in favor of or against the legal representatives of the deceased; but no right of action for an injury to the person except as provided in chapter forty-five of this Code, or to the reputation, shall so survive.

And also in the same statutory pronouncement, Title 29 Sect. 251 (D. C. Code, 1929), March 3, 1901, 31 Stat. 1241 C 854, (as later amended June 20, 1902, 32 Stat. 529 C 1329) Executors and Administrators are specifically authorized as follows:

Executors and administrators shall have full power and authority to commence and prosecute any personal action at law or in equity which the testator or intestate might have commenced and prosecuted, except actions for injuries to the person or to the reputation; and they shall also be liable to be sued in the supreme court of said District in any action at law or in equity, except as aforesaid, which might have

been maintained against the deceased; and they shall be entitled to or answerable for costs in the same manner as the deceased would have been, and shall be allowed for the same in their accounts, unless it shall appear that there were not probable grounds for instituting or defending the suits in which judgments or decrees shall have been given against them.

[fol. 61] It is clear that express statutory authority exists for the survival of this cause and the prosecution thereof by appellant administrator.

In conclusion your appellant suggests that the appellee's motion is based on points more apparent than real and his motion should be dismissed.

Respectfully submitted, Henry Lincoln Johnson, Jr.

This is to certify that a copy of the above reply was mailed to Attorney for appellee on July 11, 1941, post prepaid, at his office.

Henry Lincoln Johnson, Jr., Attorney for Appellant.

[fol. 62] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1941

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Appellant,

v.

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellees

ORDER

On consideration of motion of appellee Francis L. Hawes to dismiss this appeal, and appellant's objections thereto, it is

Ordered by the Court that the motion to dismiss be, and it is hereby, denied, without prejudice to appellee's renewing the motion as to the issue whether the appeal was taken in time, at the hearing of the case on the merits.

Dated November 13, 1941.

Per Curiam.

[fol. 60] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1941

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Appellant

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellees

RENEWAL OF MOTION TO DISMISS FOR FAILURE TO NOTE APPEAL WITHIN TIME

Pursuant to authority granted by order of this Court dated November 13, 1941, petitioner, Francis L. Hawes, renews ground (A) only, of his motion to dismiss filed June 4, 1941, and moves the Court to dismiss the appeal for failure of respondent to note the appeal within time.

1. The respondent failed to file a notice of appeal within twenty days from the entry of judgment; a notice of appeal was not filed until June 3, 1940 (Tr. 37), more than the twenty days allowed by Rule Number 10 of the Rules of [fol. 61] the United States Court of Appeals for the District of Columbia with amendments to December 16, 1936, in effect at that time. The record in this case, docketed March 3, 1941, discloses that the lower Court entered a final judgment dismissing the suit on May 7, 1940 (Tr. 36) and the docket entry of the filing of the judgment was made by the Clerk of the District Court on May 7, 1940. (Tr. 36.)

2. Respondent in an attempt to gain more time within which to note an appeal filed a motion in the District Court to enter judgment and direct the Clerk to notify parties (Tr. 38), on June 6, 1940, more than twenty days after the entry of the final judgment on May 7, 1940, which was opposed by the petitioner in amended points and authorities filed in answer to this motion on June 7, 1940. (Tr. 39.) This motion was subsequently dismissed by an order of the Court, June 24, 1940. (Tr. 49.)

3. The District Court, however, in order to give respondent an opportunity to note an appeal, entered an order vacating the judgment of May 7, 1940, on the grounds that the Clerk failed to serve a notice of the entry of the judg-

ment by mail on the plaintiff, and to make a note in the docket of the mailing. (Tr. 42.) This order was filed on June 13, 1940, more than twenty days after the final judgment entered on May 7, 1940, being 37 days later. The Court then filed on June 13, the same day, a judgment different in form but identical in substance to that filed on May 7, 1940 (Tr. 41), more than twenty days after the entry on the docket of the judgment of May 7, 1940. This was a violation of Rule 6 (b) of the Federal Rules of Civil Procedure, which provides that various periods of time for the [fol. 62] doing of an act at or within a specified time may be enlarged before the expiration of the time and even after expiration of the time where there is excusable neglect. But this rule specifically provides that the Court may not enlarge the period for taking an appeal as provided by law. This would apply whether the neglect was excusable or inexcusable. This was also in disregard of the guide to the bar and to the Courts in the case of *Burke v. Canfield*, 72 App. D. C. 127, 111 Fed. 2d 526, which held that infinite mischief has been produced in overlooking errors of form and prosecuting appeals in violation of the rules. (See *Wilson Co. v. Ward*, Vol. 69 W. L. R. 489, an opinion concerning Rule 6 (b) by Justice Luhring.) No application by motion or notice for this order of vacation was made either before or after the expiration of the twenty-day period from May 7, 1940, for noting an appeal. (See certificate of the Clerk attached hereto as Exhibit A.)

4. The notation of the judgment in the Civil Docket on May 7, 1940 (Tr. 36) as provided in Rule 79 (a) and Rule 58 of the Federal Rules of Civil Procedure constituted the entry of the judgment and the time from which it became effective for all purposes. A judgment is effective on its entry not the time of service of notice of the entry. The time for taking an appeal cannot be extended for failure to serve notice of the entry of the judgment on the parties.

Siegel vs. Margiotta, 102 Fed. 2d 525. The Court stated the law to be as follows:

> "• • • It has always been the uniform custom in federal courts so far as we know to make the time to appeal begin with the entry of the judgment, not with its [fol. 63] service upon the putative appellant; that the New Rules of Civil Procedure (28 U. S. C. A. following

section 723 c) have not changed. *Thus the Appellant must at his risk keep watch upon the entry of an order.*" (Italics supplied.)

5. There was ample notice. After the hearing of this case on April 19, 1940, oral pronouncement in open court of the findings of fact and conclusions of law on April 24, 1940 and the submission of proposed findings of fact by both parties on May 1, 1940 at which time Mr. Johnson obtained a few days to submit further findings which, however, were never submitted, the findings of fact and decree were filed on May 7, 1940 and entered on the docket. It is quite apparent that Mr. Johnson was not in the dark in these proceedings. We may infer also that if he had seriously intended to file additional findings of fact even after a "few days," he would have discovered the entry of the decree. (See full statement of occurrences, Exhibit C.) Bertha Byrd was sent, as is customary, a clipping of the advertisement of the June 4, 1940 sale and her attorney admitted that she had received it long before the 20 days for taking an appeal had elapsed, but had not turned it over to him. (See amendment to certificate of Katherine N. Hawes, Exhibit D.) The newspaper clipping on the records of the auctioneer and the receipted bill from the newspaper shows that it appeared publicly in the newspaper on May 13, 18, 25, 28, and June 3, 1940. On about June 3, 1940 Mr. Johnson stated he did not know about the 20 day limit for noting an appeal. (See Exhibit C.)

6. Respondent subsequently filed another notice of appeal on June 14, 1940 (Tr. 43) more than twenty days after [fol. 64] the final judgment entered by the lower Court on May 7, 1940, being 38 days later.

7. Petitioner filed a motion in District Court on June 24, 1940, to reconsider the order to vacate the judgment (Tr. 44) with an attached affidavit and exhibit (Tr. 47 & 48) which motion, affidavit and exhibit disclose that the respondent had notice or should have had notice of the entry of the decree of May 7, 1940, and that the Clerk of the District Court entered in his Civil Order Book a note of the mailing of the notice of entry of the judgment. Inasmuch as no order overruling this motion has been entered (see attached certificate of the Clerk of the District Court, Exhibit A) petitioner offers the explanation to the Court of

Appeals that the Court below did overrule said motion stating that it did not wish to cut off any person from an appeal, and that petitioner's attorney (see certificate, Exhibit B) did draw up an order overruling said motion when it became evident that the record was remaining incomplete and did present this order to respondent's attorney, for signing and filing.

8. It is a well recognized policy of the law to prohibit and prevent continuously delayed and uncertain litigation of an issue after litigants have had their day in Court and have been afforded due process of law. This policy is strictly enforced in order that society may not be continuously stirred up and harassed by long-continued, uncertain litigation, the continuance and uncertainty of which is more detrimental to litigants and society than any alleged original grievance of one member of society against another. The constant and continuous failure of attorneys and [fol. 65] Courts to comply with the rules of Court results in an onerous burden to the litigants involved and to society as a whole.

Respectfully submitted, John B. Gunion, Katherine H. Hawes, Attorneys for Petitioner, Francis L. Hawes, 1420 New York Avenue, N. W.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES, et al.

CERTIFICATE OF THE CLERK

This is to certify that the record of Bertha Byrd vs. Francis L. Hawes, Civil Action Number 5003 does not show the filing of any motion, or notice in writing to vacate the judgment of May 7, 1940. The only entry concerning

vacation of the judgment is that of the order of June 13, 1940 vacating the judgment; nor does the record show that [fol. 66] any order overruling the motion to reconsider order vacating judgment has been entered.

Charle E. Stewart, Clerk; by Chas. D. Coffin, Assist Clerk. (Seal.)

May 12, 1941.

EXHIBIT "B"

John B. Gunion, attorney for appellee, Francis L. Hawes, certifies that the District Court overruled the motion to reconsider the order vacating the judgment stating that it did not wish to cut off anyone from his opportunity to have a review of its decision in the case. This was in the early fall of the year of 1940; that he later became aware that no order had been presented showing that the motion had been overruled and the record was incomplete; that he drew up an order overruling the motion and presented it to an associate of appellant's attorney for signing and filing.

John B. Gunion.

[fol. 67] EXHIBIT "C"

Certificate of Katherine N. Hawes Attorney for Francis L. Hawes in Proceedings in District Court

I, Katherine N. Hawes, attorney for Francis L. Hawes, in the proceedings in this case in the District Court of the United States for the District of Columbia, do hereby certify that I have a personal recollection of the sequence of events in the case at bar from April 18, 1940 through the following summer, and that this recollection is fortified by memoranda made by me on my personal desk calendar and on copies of papers filed with the court.

The trial in this case was set for April 18, 1940 but was postponed to the following day at the instance of the plaintiff. On Friday, April 19, 1940 the case was heard in open court. At the termination of the hearing Judge Goldsborough indicated that he would take the case under advisement and read the brief which I had submitted at that time. Later Judge Goldsborough's Clerk, Mr. Molen-

off, telephoned me to ask whether I was having the transcript of the evidence written up, to which I replied that I would do so if it would be helpful to Judge Goldsborough. Whereupon I ordered the stenographic transcript and requested that it be taken direct to Judge Goldsborough. I believe Judge Goldsborough received the transcript on Monday, April 22, 1940. The decision in this case was rendered in open court on Wednesday, April 24, 1940, at which time the attorneys for plaintiff and defendant were present and were directed to draw up findings of fact, conclusion of law and a decree in accordance with the ruling of [fol. 68] Judge Goldsborough dismissing the complaint. A conference with Judge Goldsborough in chambers was set for Tuesday, April 30, 1940, but was postponed one day to Wednesday, May 1, 1940, on which day this attorney of record submitted her version of the findings of fact, conclusions of law and decree and Mr. Henry Lincoln Johnson, Jr., attorney for plaintiff, submitted his version of the findings of fact. Mr. Johnson and I exchanged copies of these papers in the Judge's chambers. Judge Goldsborough carefully read the papers submitted and then indicated that he would sign the findings of fact, conclusions of law and decree submitted by me. Mr. Johnson objected and entered into a heated discussion with Judge Goldsborough. Whereupon, Judge Goldsborough stated that he would hold up the signing of the papers submitted by me for a few days in order to give Mr. Johnson opportunity to make further suggestions in writing. So far as this attorney knows and the record shows no further suggestions were ever made by Mr. Johnson, and the decree was forthwith entered as of May 7, 1940.

The first hint that this attorney of record had that plaintiff was considering appealing the case at bar was on June 3, 1940 in a telephone conversation with plaintiff's attorney. Mr. Johnson then orally notified me that plaintiff was going to appeal and that he was going to ask the court to enjoin defendant from a proposed foreclosure sale. I answered that plaintiff could not appeal, that it was too late. Whereupon, Mr. Johnson rejoined that plaintiff had 40 days from the date of the entry of judgment and that the time for appeal had not elapsed. Thereupon we entered into an argument over the content of the rules of the courts, and Mr. Johnson plainly stated that he did not know about the twenty day rule.

[fol. 69] Appellant, plaintiff below, never filed a motion to vacate the judgment of May 7, 1940, but did file a Motion to enter Judgment and direct Clerk to notify parties, on June 6, 1940. On this same day the attorneys for plaintiff and defendant appeared in open court before Judge Goldsborough for the purpose of arguing the granting of an extension of time to plaintiff for noting an appeal. This matter was presented orally after the twenty day period for appeal had lapsed and not by motion. Judge Goldsborough indicated that he did not wish to foreclose plaintiff's right to appeal and that he would extend the time for taking the appeal. Just as this attorney was preparing to leave court after Judge Goldsborough's decision, the plaintiff's attorney handed this attorney a copy of the above mentioned Motion to enter Judgment, the only motion filed by plaintiff with reference to securing more time for taking an appeal. Judge Goldsborough's Clerk, Mr. Molenoff, later informed this attorney that Judge Goldsborough had directed Mr. Johnson to withdraw the motion he had filed, and stated further that Judge Goldsborough was not considering this motion. Judge Goldsborough, then, without notice to this attorney of record or giving her opportunity to be heard on the matter and as a complete surprise, entered an order vacating the original decree of May 7, 1940 on June 13, 1940 and entering a new Judgment as of that date. Copies of these orders of June 13, 1940 were never submitted or sent to this attorney and it became necessary for me to copy them at the courthouse. On June 24, 1940 plaintiff's Motion to enter Judgment and direct Clerk to notify parties, which had been duly answered by the defendant, came up for hearing in Motions Court, said motion never having been withdrawn. Judge O'Donoghue dismissed the motion.

Katherine N. Hawes.

[fol. 70] EXHIBIT "D"

Amendment to Certificate of Katherine N. Hawes

(Filed herewith for first time)

Katherine N. Hawes further states that Henry L. Johnson Jr. Esq. on or about June 3, 1940 stated in the telephone conversation, referred to in the original certificate (Ex-

hibit C), that Mrs. Byrd had received a clipping of the newspaper advertisement of the foreclosure sale but had not turned it over to him.

Katherine N. Hawes.

[fol. 71] EXHIBIT "E"

(Filed herewith for first time)

Book 71 Folio 280. Phones, NAtional 3090—3091

Account Sales of 616 K Street, Southwest.

Sold for account of Raymond D. Evans, Substituted and Sole Trustee.

By Thomas J. Owen & Son, Real Estate Auctioneers and Appraisers, 1431 Eye Street Northwest, Washington, D. C.

Thos. J. Owen & Son, Auctioneers 1431 Eye Street, Northwest.

Trustee's Sale of Valuable Brick Dwelling Known as Premises No. 616 K Street, Southwest.

By virtue of a certain deed of trust duly recorded, in Liber No. 6350, Folio 353 *et seq*, of the land records of the District of Columbia, and at the request of the party secured thereby, the undersigned trustee will sell, at public auction in front of the premises, on Tuesday the Fourth Day of June A. D. 1940, at Three O'Clock P. M. the following-described land and premises, situate in the District of Columbia, and designated as and being lot 35 in John Van Riswick's subdivision of lots in Square 471 as per plat [fol. 72] recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 30.

Terms: Sold subject to a prior deed of trust for $3,500.00 now overdue, further particulars of which will be announced at time of sale; the purchase price above said trust to be paid in cash. A deposit of $300.00 required. Conveyancing, recording, revenue stamps, etc., at purchaser's cost. Terms to be complied with within thirty days, otherwise deposit forfeited and the property may be advertised and resold at the discretion of the trustee.

Raymond D. Evans, *Substituted and Sole Trustee.*
Katherine N. Hawes, *Attorney for Holder of Note.*

Appointed in Civil Action No. 5003.

June 4, 1940

Sold to J. Oliver Hill for	$1,200.00
Subject to prior deed of trust (overdue) for	3,500.00
" " overdue interest	
" " " " taxes	$4,700.00
" " appeal filed in Court of Appeals	

[fol. 73] Charges

To Herald	$30.00
" Fee	25.00
" Balance	245.00
By Deposit $300.00	$300.00

EXHIBIT F

(Filed herewith for the first time)

Times Herald
Published Daily and Sunday
Washington, D. C.

June 3, 1940

Thos. J. Owen & Son, 1431 Eye Street, N. W., Washington, D. C.

Trustees: Raymond D. Evans.

Classified Advertising. Date: 1940, May 13, 18, 25, 28; June 3. 616 K Street, S. W.

Paid. Times-Herald.

[fol. 77] Thursday, May 14th, A. D. 1942.

Before Honorable Harold M. Stephens, Fred M. Vinson and Henry W. Edgerton, Associate Justices

No. 7844

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

Francis L. Hawes and Raymond D. Evans, Appellees

The argument in the above entitled cause on the motion to dismiss was commenced by Mr. John B. Gunion, attorney for appellee, and concluded by Mr. Henry Lincoln Johnson, Jr., attorney for appellant. Appellees allowed to file memoranda.

The argument on the merits in the above entitled cause was commenced by Mr. Henry Lincoln Johnson, Jr., attorney for appellant, continued by Mr. John B. Gunion, attorney for appellees, and concluded by Mr. Henry Lincoln Johnson, Jr., attorney for appellant. Appellant allowed five days within which to file statement of facts; appellees allowed three days to file counter-statement. Appellees allowed to file memorandum of additional authorities.

[fol. 75] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

v.

FRANCIS L. HAWES, Individually, etc., et al.

Appeal from the District Court of the United States for the District of Columbia

Decided October 12, 1942

Mr. Henry Lincoln Johnson, for appellant.
Mr. John B. Gunion, with whom *Miss Katherine N. Hawes* was on the brief, for appellees.

Before Stephens, Vinson and Edgerton, Associate Justices

OPINION

STEPHENS, *Associate Justice:*

This case was brought here on appeal from a decree of the District Court of the United States for the District of Columbia dismissing a complaint of the plaintiff below, the appellant here. On June 4, 1941, the appellee filed in this court a motion to dismiss the appeal upon the ground, among others, that it was not noted within time. On November 13 following, we denied this motion without prejudice to the appellee's right to renew the same, upon the single ground mentioned, at the argument on the merits. The motion was so renewed and was argued at the time of the argument on the merits. We think the motion to dismiss must be granted.

After the hearing below on the complaint and an amended answer, proposed findings of fact and conclusions of law were presented to the trial judge by each party on May 1, 1940. On May 7 the judge signed a judgment dismissing the complaint. This judgment was noted in the docket in compliance with Rule 79 (a) of the Federal Rules of Civil Procedure which requires the clerk of the District Court to

keep a civil docket, and requires that all judgments shall be noted chronologically in the same and that the notation of a judgment shall show the date the notation is made. Rule 58 provides that the notation of a judgment in the civil docket as required by Rule 79 (a) constitutes the entry of the judgment and that the judgment is not effective before such entry. Rule 10 of the rules of this court in effect until January 31, 1941, provided:

> No * * * judgment * * * of the District Court of the United States for the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within 20 days after the * * * judgment * * * complained of shall have been made or pronounced. * * *

That twenty day period expired May 27, 1940. No notice of appeal was filed in the District Court during that period, although one was filed on June 3. At the time of the entry [fol. 76] of the judgment of dismissal on May 7 the clerk apparently did not send out the notice required by Rule 77 (d) of the Federal Rules of Civil Procedure. That rule provides:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

No note in the docket of the mailing of such a notice appears in the record before us, and it is without dispute in the case that no such notice was sent out. On June 6, notwithstanding the entry of the judgment of dismissal on May 7, the appellant filed a "Motion to Enter Judgment and Direct Clerk to Notify Parties." The motion stated as reasons that "the clerk of the court had failed to enter the day or month of the judgment of this court as is required by the rules of this court," and "that the clerk of this court has failed to notify the parties to this cause of the action of the court in this cause." This motion was not acted on until

June 24, 1940, when the District Court denied it. But in the meantime, on June 13, the trial judge, apparently on his own motion, ordered the judgment of May 7 vacated "for the reason that the clerk failed under Rule 77 (d) of the Rules of Civil Procedure to serve a notice of the entry of judgment by mail on the plaintiff * * * and to make a note in the docket of the mailing." On the same day, June 13, the trial judge signed and filed a second judgment in the same terms as the one of May 7. This judgment was noted in the docket. The appellant, treating this judgment of June 13 as the effective judgment in the case, filed a notice of appeal from it on June 14.

The question under the motion to dismiss is whether or not the appeal must have been taken within twenty days from the entry of the first judgment on May 7, or, putting it otherwise, was the trial judge warranted, because of the failure of the clerk to notify the parties of the entry of the judgment of May 7, in entering a second judgment, the one of June 13, and did the trial judge's action have the effect of extending the time for appeal, that is, of starting a second period of twenty days to run.

Three other rules of the Federal Rules of Civil Procedure are urged as pertinent: Rule 6 (b) by the appellee; Rules 60 (a) and 60 (b) by the appellant. Rule 6 (b) permits the trial court to enlarge time, but expressly states that "it may not enlarge * * * the period for taking an appeal as provided by law." Rule 60 (a) provides:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 60 (b) provides, so far as here pertinent:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. * * *

[fol. 77] We are cited to no authority and find none construing the rules above referred to in respect of the particular point with which we are here concerned. We must therefore decide the question according to our best judgment as to the meaning of the rules as written.

We think that while the requirement of Rule 77 (d) that the clerk immediately upon the entry of judgment shall serve a notice of the entry by mail upon the affected parties and make a note in the docket of the mailing of such notice should be complied with in every case, nevertheless the effectiveness of a judgment does not depend upon compliance with that requirement, but only upon notation in the civil docket as provided by Rules 58 and 79 (a); and we think that the failure of the clerk to comply with Rule 77 (d) did not warrant the District Court's setting the judgment aside. We think that the prohibition of Rule 6 (b) against the District Court's enlarging the period for the taking of an appeal as provided by law is absolute. We think that Rules 60 (a) and 60 (b) are inapplicable. The omission of the clerk to mail the notice of entry of judgment and to make a note in the docket of the mailing cannot correctly be described as a clerical mistake in the judgment itself within Rule 60 (a). So far as 60 (b) is concerned, there was no motion before the trial court to relieve *a party or his legal representative* from a judgment taken against him through *his* mistake, inadvertence, surprise or excusable neglect. The mistake involved in the omission to mail the notice of entry of judgment and to make a note in the docket of the mailing was that of the clerk. It is well settled that the rules of this court have the force of law. *Murphy* v. *Gould*, 39 App. D. C. 363 (1912), *certiorari denied*, 226 U. S. 613 (1913); *Talty* v. *District of Columbia*, 20 App. D. C. 489 (1902). *Cf.* also *Ex parte Dante*, 228 U. S. 429 (1913). In that case the same Rule 10 of our old rules as is involved in the instant case was the subject of the decision.

In *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258 (1888), a final decree dismissing a bill for want of equity was entered on January 22, 1883, by the United States Circuit Court for the Eastern District of Arkansas. At that time the period within which a writ of error might be brought or an appeal taken to the Supreme Court was two years after the entry of a judgment, decree or order. On January 22, 1885, exactly two years after the entry of the decree of dismissal, a petition for an appeal was presented to Mr. Justice Miller of the Supreme Court by the plaintiff and allowed, and at the same time that he allowed the appeal, he signed a citation to the defendants to appear in

the Supreme Court to answer the appeal, and he also then approved a bond for costs presented to him. These papers were, however, not presented to the Circuit Court and filed with the clerk thereof until January 27, 1885. At that time under a ruling of the Supreme Court in *Brooks* v. *Norris*, 11 How. 204 (U. S. 1850),[1] it was the rule that it was the filing of the appeal papers in the inferior court which removed the record therefrom to the appellate court and that the period of limitation prescribed by the Act of Congress must be calculated accordingly. When the papers were presented to the Circuit Court on January 27 that court, [fol. 78] apparently in an attempt to make the appeal effective notwithstanding the five day lapse, entered an order in the following terms:

> Comes N. & J. Erb [attorneys for the plaintiff] and pray the court to enter an order granting to the plaintiff an appeal in this cause to the Supreme Court of the United States, which motion is denied, such appeal having heretofore been granted. It is ordered by the court that this entry bear date as of January 22, 1885. [128 U. S. at 259]

In short the Circuit Court attempted by a nunc pro tunc order to make it appear that the appeal had been perfected within the two year period. The Supreme Court, on its own motion, dismissed the appeal as late. In respect of the nunc pro tunc order, speaking through Mr. Justice Bradley, it said:

> The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter. [128 U. S. at 261]

The device of attempted vacating of the first judgment and the filing and noting in the docket of another in the instant case we think equally ineffective. It, if recognized, would,

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[1] This decision was adhered to in *Mussina* v. *Cavazos*, 6 Wall. 355 (U. S. 1867); *Scarborough* v. *Pargoud*, 108 U. S. 567 (1883); *Polleys* v. *Black River Co.*, 113 U. S. 81 (1885).

like the nunc pro tunc order in *Credit Co.* v. *Ark. Central Railway*, make a dead letter of our rule fixing a definite time for appeal.

In accordance with the foregoing the motion to dismiss the appeal is granted; costs to be borne by the appellant.

Appeal dismissed.

[fol. 82] Monday, October 12th, A. D. 1942.

Before Honorable Harold M. Stephens, Fred M. Vinson and Henry W. Edgerton, Associate Justices, in Chambers

No. 7844, October Term, 1942

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

Francis L. Hawes, Individually &c., et al., Appellees

Appeal from the District Court of the United States for the District of Columbia

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that this appeal be, and the same is hereby, dismissed, with costs to be borne by appellant.

Per Mr. Justice Stephens.

Dated October 12, 1942.

[fol. 83] Wednesday, November 4th, A. D. 1942.

Before Honorable Harold M. Stephens, Fred M. Vinson and Henry W. Edgerton, Associate Justices, in Chambers

No. 7844

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

Francis L. Hawes, Individually, etc., et al., Appellees

On consideration of appellant's motion for a rehearing and for a stay of the mandate for thirty days,

It is ordered by the Court that the motion for rehearing be, and it is hereby, denied, and that the motion for a stay of the mandate for thirty days be, and it is hereby, granted.

[fol. 84] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 30, 1943. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Number 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

FRANCIS L. HAWES, etc., et al., Appellees

DESIGNATION

The clerk of the Court will please prepare a certified transcript of the following proceedings and papers in the above entitled cause:

1. Appendices of the briefs of Appellant and appellee Hawes.
2. Minute entry of argument.
3. Motion of Appellee Hawes to Dismiss Appeal, omitting all exhibits attached thereto.
4. Minute entry of denial of motion to dismiss appeal with leave to renew the same.
5. Reply of Appellant to motion to dismiss.
6. Renewed motion to dismiss appeal.
7. Opinion.
8. Judgment.
9. Minute entry of denial of petition for rehearing.
10. This designation.
11. Clerks certificate.

Henry Lincoln Johnson, Jr., Attorney for Appellant Hill.

This is to certify that I have mailed to John B. Gunion, Esq., 1420 N. Y. Ave. N. W., attorney for appellee Hawes, a copy of the foregoing Designation this 31st day of January, 1943.

Henry Lincoln Johnson, Jr.

[fol. 85] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 84, both inclusive, constitute a true copy of the appendices to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for the appellant in the case of: J. Oliver Hill, Administrator of the Estate of Bertha Byrd, deceased, Appellant, vs. Francis L. Hawes, Individually, etc., et al., Appellees, No. 7844, October Term, 1942, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this second day of February, A. D. 1943.

Joseph W. Stewart, Clerk of United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 82] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1943

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,209, U. S. Court of Appeals, District of Columbia, Term No. 4. J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Petitioner, vs. Francis L. Hawes, Individually and as Trustee and Raymond D. Evans, Trustee. Petition for a writ of certiorari and exhibit thereto. Filed February 4, 1943. Term No. 4 O. T. 1943.

IN THE

Supreme Court of the United States

No. 103

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner,*

vs.

Francis L. Hawes, Individually and as Trustee

and

Raymond D. Evans, Trustee

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

Henry Lincoln Johnson, Jr.,
Thurman L. Dodson,
Attorneys for Petitioner,
615 F St., N.W.
Washington, D. C.

THE LAW REPORTER PRINTING COMPANY

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IN THE

Supreme Court of the United States

No.

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner*,

vs.

FRANCIS L. HAWES, Individually and as Trustee

and

RAYMOND D. EVANS, Trustee

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, deceased, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, in the above-entitled cause, docket number 7844, decided October 12, 1942, petition for rehearing denied November 4, 1942, dismissing the appeal of your petitioner from an adverse judgment in the District Court of the United States for the District of Columbia.

STATEMENT

This Cause grows out of an appeal by petitioner from an adverse judgment in the District Court of the United States for the District of Columbia. After trial upon the merits below each party submitted findings of fact, conclusions of law and decrees, which the Court took under advisement. Subsequently, in chambers, out of the presence of Counsel and parties and without notice, on May 7, 1940, the trial court signed findings of fact, conclusions of law and a decree, and directed his clerk to file and enter the same. No notice was sent to parties of such act or entry as was required under Rule 77 (d) of the Federal Rules of Civil Procedure, nor was a note of such mailing entered in the docket as was also required by Rule 77 (d) Supra. On June 3, 1940, twenty-three days after May 7, 1940, plaintiff's attorney became apprized of the entry of the judgment for the first time, and forthwith noted an appeal therefrom in proper form. (R. Pg. 75). On June 6, 1940, Petitioner's attorney filed a motion "To Enter Judgment and Direct Clerk To Notify Parties," and assigned as reasons therefor the fact that neither counsel nor litigant knew or had notice of the action of the Court, as required by Rule 77 (d) of the Federal Rules of Civil Procedure.

This motion was heard in open Court on June 13, 1940, and, while not granting or denying the same, the Court, without formal motion specifically requesting it, directed petitioner to prepare an order vacating the decree of May 7, 1940, and assigned as reason therefore "the failure of the clerk to notify counsel or litigants and to make a note of such mailing in the docket." Plaintiff below, filed such an order on June 13, 1940, and thereupon the Court entered a second judgment, not materially differing from the prior judgment of May 7, 1940 as to scope and effect, and the clerk properly notified all parties of this action. (R. Pg. 76) Plaintiff below, forthwith (R. Pg. 76) noted an appeal therefrom. On June 14, 1940 (R. Pg. 76) Respondent Hawes did

not note an appeal from the action of the Court in this regard. That Respondent Hawes, treating the original judgment as the only proper or valid judgment, filed a motion to dismiss the appeal of petitioner, assigning as one of the reasons, inter alia, that the Notice of Appeal had not been filed within twenty days of May 7, 1940, the said period being provided for in Rule 10 of the lower appellate court.

Your respondent filed a petition for a rehearing (R. Pg. 79) which was denied on November 4, 1942.

QUESTIONS OF LAW PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia can fix a time other than that set out in Title 28, Section 230 of the United States Code (Ann.) for the taking of appeals.

2. Whether Rule 77 (d) makes the giving of notice by the clerk a prerequisite to the running of the period within which an appeal must be taken in the absence of actual notice.

REASONS FOR GRANTING PETITION

1. This case involves the interpretation of Rules 73 (a) (b), 77 (d), 58, 6 (e), 81 (d) of the Federal Rules of Procedure.

2. That the Lower Appellate Court has misapplied the decisions of the Court as announced in Brooks vs. Harris, 11 How. (U. S.) 204, and Credit Co. vs. Ark. Cent. Ry., 128 (U. S.) 258.

3. That the Court below has misinterpreted the provisions of the following Federal Statutes:

Act of July 30, 1894, c. 172, 28 Stat. 160 Sect. 6.
Act of February 13, 1925, Ch. 229, 43 Stat. 936, Sections 5 and 13.

4. That it is a matter of general importance that the question of the time within which to take an appeal from the United States Court of Appeals for the District of Columbia should be settled by this Court, especially where a proper interpretation of its rules the plain provisions of the New Rules of Civil Procedure, and Applicable Federal Statutes, would seem to be in conflict with the decision of the Court below.

5. That the decision does violence to the apparent effort, both of this Court and the Congress to include the judiciary of the District of Columbia within the Federal System.

THURMAN L. DODSON,
HENRY LINCOLN JOHNSON, JR.,
Attorneys for Petitioner,
615 F Street, Northwest

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner*,

vs.

FRANCIS L. HAWES, Individually and as Trustee

and

RAYMOND D. EVANS, Trustee

Respondents

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF ERROR

I

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the District of Columbia was rendered on October 12, 1942, but is as yet unreported, (R. Pg.) and judgment thereon was entered thereafter.

II

JURISDICTION

Petition for a rehearing was denied in the cause below on November 4, 1942, (R. Pg. 79).

The jurisdiction of the Court is invoked under paragraph c of Section 5 of Rule 38 and Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, ch. 229, Sec. 1, 43 Stat. 938.

III

STATEMENT

A statement of the facts and the questions involved will be found in the petition for a writ of certiorari, Page 2.

IV

SUMMARY OF ARGUMENT

A

Your petitioner claims that the United States Court of Appeals for the District of Columbia, at least since February 13, 1925, has had no authority to fix a time for taking an appeal from the District Court of the United States for the District of Columbia substantially shorter than the period of time provided in the Act of February 13, 1925, 43 Stat. 936 P. 229; Sect. 8(c); Title 28, Section 230, United States Code.

At the creation of the Court of Appeals for the District of Columbia statutory authority was given specifically given to "fix the time and method of taking appeals," but that this specific authority was withdrawn one year later when Section 6 of the act of creation, 27 Stat. 434, c. 74, February 9, 1893, was amended by the Act of July 30, 1894, c. 172, 28 Stat. 160 so as to eliminate from the act the reference to the power to make rules as to the time of taking appeals. That this elimination of the power to make rules with reference to the time of taking appeals left the local appellate court with the same authority, at least from

the language of the statutory enactments, that other federal circuit courts of appeals possessed and none other.

This general warrant of rule making authority is the only statutory grant by which the local court of appeals can ground its authority in this particular. Through subsequent legislation the Court of Appeals for the District of Columbia was affirmatively brought within the orbit of the Federal Judicial system both in interpretation by Courts and legislative fiat. Now, by name, legislative regulation of the manner of the exercise of its appellate jurisdiction, and, the Federal Rules of Civil Procedure, the analogy or parallel between the local courts and the federal courts has grown into almost complete identity.

B

Petitioner tried the cause in the nisi prius court upon the merits and at the conclusion of the hearing the court, sine die, and requested that the parties submit conclusions of law, findings of fact and forms of decrees or judgments. This was done and the matter remained with the court under advisement for approximately two weeks. Then without notice to parties or attorneys, the court signed from out of the papers submitted those he had determined represented his conclusions and directed the clerk to file them. No notice to parties or attorneys was given of this act, by the court, nor did the clerk, as he was required under rule 77 (d) of the Federal Rules of Civil Procedure, notify either attorneys or litigants.

That your petitioner treating the lack of notice as tolling the time within which the appeal should be taken, or as a ground for relief from the judgment, noted an appeal 23 days after the actual entry of the judgment, (the rule of the Court of Appeals required the appeal to be taken within 20 days), and filed a motion calling the Court's attention to the lack of notice and of his surprise at the action of the Court. The Court below vacated the judgment

and reentered the same upon the ground that the petitioner had not been notified of the judgment, whereupon a second notice of appeal was noted by petitioner. The appellate Court below held that the vacation of the judgment was only a dodge to extend the time for taking an appeal which was forbidden by holding that the court had not warrant to set aside the judgment for lack of notice. Your petitioner claims that the action of the appellate Court below improperly dismissed the appeal as not taken within time.

V

ARGUMENT

A

The United States Court of Appeals for the District of Columbia has no authority to fix a different time or manner of taking appeals from the District Court of the United States for the District of Columbia than that prescribed for similar appeals from Federal District Courts to Circuit Courts of Appeals of the United States.

By federal statute, approved February 4, 1893, C. 74, 27 Stat. 434, Congress did create what is now known as the United States Court of Appeals for the District of Columbia and did authorize said court in Section 6 thereof to "make such rules and regulations as may be necessary and proper for the transaction of business to be brought before it and *for the time and method of the entry of appeals.*" (Italics supplied) Section 6, however, was amended by the Act of July 30, 1894, c. 172, 28 Stat. 160, to read as follows:

> "Section 6. That said Court of Appeals shall establish by rule of Court such terms of the Court in each year as to it may seem necessary; Provided, However, that there shall be at least three terms each year, and it shall make such rules and regulations as may be necessary and proper for the transaction of its business *and the taking of appeals to said Court.*" (Italics supplied.)

Assuming that in the original act of creation the Court of Appeals, in its own discretion, had authority to promulgate a rule limiting the time for taking an appeal, it is implicit that by amending the original act of creation and eliminating from its provisons the language "the time and method of the entry of appeals" the Congress repealed the omitted provision.

King vs. Cornell, 106 U. S. 395, 27 L. Ed. 60.

Also see:

In Re Heath, 144 U. S. 92;
Jones vs. Crosswell, 60 Fed. 2nd 827.

The most liberal and favorable rule as to the extent of the lower appellate court's power to make a rule with reference to the time for taking an appeal would depend upon an absence of any statute of the federal government not locally inapplicable in the District of Columbia with regard to the subject matter. An examination of the pertinent statutes reveals without doubt that such liberality of construction is not indicated for there is a federal statute regulating the time for taking appeals in like circumstances.

Section 230, Title 28 of the U. S. Code prescribes the time for taking an appeal from a District Court to a Circuit Court of Appeals in the following language:

"Section 230. Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review shall be allowed unless application therefore be duly made within three months after the entry of such judgment or decree. (Mar. 3, 1891, c. 517, Sec. 11, 26 Stat. 329; February 13, 1925, c. 229, Sec. 8 (c), 43 Stat. 940."

(N. B. Writs of error abolished 45 Stat. 45; 1928)

In the Act of February 13, 1925, Chapter 229, 43 Stat. 936, amending Section 240 of the Judicial Code, entitled "an Act to amend the Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and for other purposes," Congress, for the first time, makes provision for the manner of the exercise of the jurisdiction of the United States Court of Appeals for the District of Columbia:

> "Section 5. That the Court of Appeals of the District of Columbia shall have the same appellate and supervisory jurisdiction over proceedings, controversies, and cases of bankruptcy in the District of Columbia, that a Circuit Court of Appeals has over such proceedings, controversies, and cases within its circuit, and shall exercise that jurisdiction in the same manner as a Circuit Court of Appeals is required to exercise it."

Now, however, no Circuit Court of Appeals can fix a different time for taking an appeal than that set out by Section 230, Title 28, supra. This Court in *Alaska Packers* vs. *Pillsbury, Deputy Commissioner*, 301 U. S. 174, (1937), which cause arose under the Longshoremens and Harbor Worker's Act, held that a rule respecting the manner of taking an appeal adopted by the United States Circuit Court of Appeals for the Ninth Circuit, which was not in accord with Section 230, Title 28, supra, had no force. At page 177, this Court said:

> "but this rule controvenes the Statute and has no force, for the power of the Court to make rules necessarily is confined to such as are consistent with controlling laws."

It is difficult to justify the exercise of its jurisdiction to make rules in making a rule limiting the time within which an appeal may be taken to a period shorter than that provided in the Act of February 13, 1925, supra, when every legislative and judicial effort has been made through chang-

ing its name, jurisdiction and procedure, to make the parallel between the local Courts and the Federal Courts, if not their legal identity complete. Indeed this Court has had occasion to remark in *O'Donoghue* vs. *United States*, 269 U. S. 516, 77 L. Ed. 1356, reversing the Court of Appeals, D. C., at page 1367:

> "The parallelism between the Supreme Court of the District of Columbia and the Court of Appeals, on the one hand, and the District Courts of the United States and the Circuit Courts of Appeals, on the other, in consideration and disposition of cases involving what among states would be regarded as within federal jurisdiction is complete."

Furthermore, in 1937, pursuant to statutory authority and direction vested in it by Section 2 of the Act of June 19, 1934, chapter 624, 48 Stat. 1665, 28 U. S. Code, Sec. 723 (b), (c), adopted rules of civil procedure for the District Courts of the United States and for certain aspects of appellate methods and procedure in Circuit Courts of Appeal. These rules were made applicable to the Courts of the District of Columbia in their entirety.

Rule 81 (d) Federal Rules of Civil Procedure. Without determining the power of this Court thereunder to change the time provided by law for taking an appeal in Title 28, Section 230, supra, it did not do so, but rather, in consonance with said statute, promulgate Rule 73, the pertinent part of which is as follows:

> "Appeal to a Circuit Court of Appeals"
>
> "(a) How taken. When an appeal is permitted by law from a District Court to a Circuit Court of Appeals and within *the time prescribed*, a party may appeal from a judgment by filing with the District Court a Notice of Appeal." (Italics supplied.)

"The time prescribed" referred to in the above Rule, and

that which is in force generally among all federal courts is the three month period set out in Section 230, Title 28, supra. This is the view of the Advisory Committee on Rules. See notes of Advisory Committee on Rules at page 750 of Title 28, following Section 823 (c) reading as follows:

> "3. This rule continues in effect the Statutes providing for the time for taking an appeal such as: U. S. C. Title 28, Sec. 230 (Time for making application.)

It is respectfully submitted that the invocation of Rule 10 of the United States Court of Appeals for the District of Columbia, which was adopted by that Court in 1893, to dismiss the appeal in that court of your petitioner, which rule prescribes a twenty (20) day period, is without warrant in law.

B

The Lower Court has improperly applied decisions of this Court and improperly interpreted Rule 77 (d) of the Federal Rules of Civil Procedure.

In sustaining the respondent Hawes' motion to dismiss the appeal of your petitioner from an adverse decision of the District Court of the United States for the District of Columbia, the Court below disposes of Rule 77 (d) in the following fashion:

> "We think that the requirement of Rule 77 (d) that the clerk immediately upon entry of judgment shall serve notice of the entry by mail upon the affected parties and make a note in the docket of such notice should be complied with in every case, nevertheless the effectiveness of a judgment does not depend upon compliance with that requirement, but only upon notation in the civil docket as provided by Rules 58 and 79 (a); and we think that the failure of the clerk to compl-

with Rule 77 (d) did not warrant the District Court's setting the judgment aside."

Rule 77 (d) of the Federal Rules of Civil Procedure replaced old Equity Rule 4 of this Court which provided as follows:

NOTICE OF ORDER

"NEITHER the noting of an order in the Equity docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the Court, or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order."

Reading the two rules together it is plain to see that the intent of the Court was to provide notice to parties of the action of a Court in cases where, at least, there was not actual notice. It is a rather shocking conclusion which permits a Court to make a rule that an act has to be done within 20 days of the happening of an event which is not controlled by a party, affirmatively provide for notice in the event that he is not present or actually aware of the happening of the event, and, then deprive him of the exercise of that right, when the failure to exercise it is attributable to the failure of its clerk to provide notice in violation of its rules. Indeed the virtual emasculation of Rule 77 (d) by the lower Court's decision effectively deprives the petitioner of his right of appeal by interpretation and construction. Under its decision, the right to notice occupies the same relative position as the highly popular, but totally unnecessary practice of including prize whistles in bags of popcorn.

In reaching its conclusion the lower Court, in effect, says

that complaint made under Rule 60 (b) for relief from a judgment may be had where "the mistake, inadvertence or surprise was that of a party or his legal representative" and, concludes, that since the "mistake" was that of the clerk, no relief as against that judgment was permitted your petitioner thereunder. Your petitioner has no quarrel with the conclusion that the mistake was that of the clerk in failing to notify him or his counsel, but he assuredly says that both he and his counsel were "surprised" by the irregular entry of the judgment to their prejudice, and consequently entitled to relief therefrom under Rule 60 (b). It is suggested that inasmuch as the trial Court's action was not void in setting aside the judgment of May 7, 1940, and certainly not an abuse of discretion, the lower court erred in dismissing the appeal of your petitioner.

The lower Court cites, in support of its conclusion that the effect of the decision of the lower court was to improperly extend the time for taking an appeal, two cases heretofore decided by this Court, to-wit: *Credit Co.* vs. *Ark. Central Ry.*, 128 U. S. 258 (1888) and *Brooks* vs. *Norris*, 11 How. (U. S. 1850), which in effect say that a court has no power to extend the time for taking an appeal after it has expired. The only similarity between the cases cited and the case at bar is that they involve a situation where the time for appeal has expired. In neither of the cases was there any secret entry of a judgment in violation of direct rule of court to the prejudice of the prompt exercise of the right of appeal by a litigant.

In concluding its opinion the Court says "The device of attempted vacating of the first judgment and the filing and noting in the docket of another in the instant case we think equally ineffective. It, if recognized, would, like the nunc pro tunc order in *Credit Co.* vs. *Ark. Central Railway*, make a dead letter of our rule fixing a definite time for appeal." Their effort to save the life of Rule 10 of the Court of

Appeals while reading the funeral service of Rule 77 (d) is wholly inconsistent and untenable.

In conclusion your petitioner says that the decision of the lower court effective deprives your petitioner of his right of appeal without due process of law.

Respectfully submitted,

HENRY LINCOLN JOHNSON, JR.,
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615 F St., N.W.
Washington. D. C.

FILE COPY

IN THE

Supreme Court of the United States

No. 708

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner*

vs.

FRANCIS L. HAWES, Individually and as Trustee

and

RAYMOND D. EVANS, Trustee, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR FRANCIS L. HAWES IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 708

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, *Petitioner*

vs.

FRANCIS L. HAWES, Individually and as Trustee

and

RAYMOND D. EVANS, Trustee, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COULMBIA

BRIEF FOR FRANCIS L. HAWES IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia is reported in 132 F. 2d 569.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was dated October 12, 1942 (R. 79). The petition for rehearing was denied November 4, 1942 (R. 79, 80). The mandate was issued January 7,

1943.[1] Judgment on the mandate was entered February 4, 1943.[2] The petition for a writ of certiorari was filed February 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and paragraph c of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States amended to May 26, 1941.

Statement

Respondent deems it necessary under authority of Rule 27 (4) to supply a full statement.

The case was brought on March 3, 1941, to the United States Court of Appeals for the District of Columbia on appeal from a decree of the District Court of the United States for the District of Columbia dismissing a complaint of petitioner. On June 4, 1941 the respondent, Francis L. Hawes, filed a motion to dismiss the appeal in the Court of Appeals upon the ground, among others, that it was not noted within time (R. 48). On November 13, 1941 this motion was denied without prejudice to the respondent's right to renew the same, upon the single ground mentioned, at the argument on the merits (R. 59). The motion was renewed (R. 60) and was argued at the time of the argument on the merits (R. 74). On October 12, 1942 the Court of Appeals granted the motion to dismiss (R. 79).

Facts pertinent to the grounds for the motion to dismiss follow. After the hearing of the case in the District Court

[1] Proof of this date may be obtained by certiorari to the United States Court of Appeals for the District of Columbia in order to correct diminution of the record.

[2] Proof of this may be obtained by certiorari to the District Court of the United States for the District of Columbia in order to correct diminution of the record.

of the United States for the District of Columbia on April 19, 1940, and oral pronouncement in the presence of both parties by the Trial Court of the findings of fact and conclusions of law on April 24, 1940, on May 1, 1940 petitioner handed in proposed findings of fact. Respondent handed in findings of fact, conclusions of law and a decree for signature of the court. When the Trial Court indicated that it would sign the findings of fact, conclusions of law and decree submitted by respondents, Mr. Johnson, counsel for the petitioner, obtained a few days to submit further findings, which however, were never submitted. The respondent's proposed findings of fact, conclusions of law and decree dismissing the complaint were signed and filed by the court on May 7, 1940. (See full statement of occurrences, Exhibit C at R. 67, 68, Tr. 32, 34, 36.) This judgment was noted in the clerk's Civil Docket on May 7, 1940 (Tr. 36 and supplemental transcript of record).

No note in the Civil Docket of the mailing made by the clerk appears in the record, but the clerk's affidavit shows that he made a large letter "N" in the Day Book of Civil Division No. 3 beside the final decree entered in that book, which signified that notice of the entry of the final decree was written up for mailing to the parties therein (Tr. 47).[1] The usual custom is that a messenger picks up such notices and places them in the mail. There is no direct evidence that it was not done in this case, nor is there any direct evidence in the record that petitioner failed to receive a notice. Advertisement of a foreclosure sale of the property involved in the suit to take place on June 4, 1940 appeared publicly in the newspaper May 13, 18, 25, 28 and June 3, 1940 (Exhibits E, F at R. 12, 13, 14). Publication of the

[1] This may be obtained by certiorari to the District Court of the United States to correct diminution of the record.

entry of the decree dismissing suit appeared in the legal record of the Washington Post on May 8, 1940 (Tr. 48).

On June 3, 1940 petitioner's attorney hinted that he was going to appeal the case. Respondent's attorney told him that petitioner could not appeal, that it was too late. Whereupon petitioner's attorney rejoined that petitioner had 40 days from the date of the entry of judgment and that the time for appeal had not elapsed, and he then explained that he did not know about the twenty day limit for taking appeals. (See full statement in Exhibit C at R. 68.) The twenty day period for noting an appeal expired May 27, 1940. The record docketed in the Court of Appeals March 3, 1941 discloses that no notice of appeal was filed by petitioner in the District Court during that twenty day period, although one was filed on June 3, 1940 (Tr. 37 and supplemental trans. of record).

On June 6, 1940, more than twenty days after entry of judgment on May 7, 1940, petitioner filed a motion in the District Court to enter judgment and direct the clerk to notify parties (Tr. 38). Petitioner asserts broadly in his statement on page 2 of the petition for a writ of certiorari that the reasons assigned in said motion were that "* * * neither counsel nor litigant knew or had notice of the action of the Court as required by Rule 77 (d) of the Federal Rules of Civil Procedure", whereas the only analogous ground of the motion was based on the alleged failure of the clerk to notify the parties of the action of the court (Tr. 38). This motion was opposed by the respondent in amended points and authorities filed on June 7, 1940 (Tr. 39). The motion was subsequently dismissed by the District Court on June 24, 1940 (Tr. 49).

Meanwhile on June 13, 1940 the Trial Court entered an order vacating the judgment of May 7, 1940 without notice to respondent or opportunity to be heard (Tr. 42, Exhibit C at R. 67, 69). The record does not show the filing of any motion or notice in writing to vacate the judgment of May 7, 1940 either before or after the expiration of the 20 day period for noting an appeal; the only entry in the record concerning vacation of the judgment is that of the order of June 13, 1940 vacating the judgment (Supplemental transcript of record, Exhibit A at R. 65, Tr. 42). On the same day, June 13, 1940, the Trial Judge signed and filed a second judgment in the same or similar terms as the one of May 7, 1940 (Tr. 41). On June 14, 1940 petitioner filed a notice of appeal from the judgment of June 13, 1940 in favor of Francis L. Hawes and Raymond D. Evans against Bertha Byrd (Tr. 43). Respondent filed a timely motion in District Court on June 24, 1940 to reconsider the order to vacate the judgment (Tr. 44) with the attached affidavit and exhibit (Tr. 47, 48). Inasmuch as no order overruling this motion had been entered (Exhibit A at R. 65) respondent offered the explanation to the Court of Appeals that the Trial Court overruled said motion stating that it did not wish to cut off any person from an appeal, and that respondent's attorney had drawn up an order overruling said motion when it became evident that the record was incomplete and presented this order to petitioner's attorney for signing and filing (Exhibit B at R. 65), which signing and filing was never consumated.

Summary of Argument

The United States Court of Appeals for the District of Columbia properly dismissed the appeal of the petitioner for failure to file a notice of appeals within 20 days from

the entry of judgment on May 7, 1940 in the District Court of the United States for the District of Columbia. Rule 10 of the rules of the Court of Appeals provided that no judgment of the District Court of the United States for the District of Columbia or of any justice thereof was to be reviewed by the Court of Appeals, unless the appeal was taken within 20 days after the judgment complained of had been made or pronounced.

Petitioner's contention that the Act of February 13, 1925, 43 Stat. 936, c. 229, Section 8 (c); Title 28, Section 230, United States Code Annotated, allowing an appeal intended to bring any judgment or decree before the Circuit Court of Appeals for review, provided application be made within three months after the entry of such judgment or decree included the United States Court of Appeals for the District of Columbia is without foundation.

The taking of appeals from the District Court of the United States for the District of Columbia to the United States Court of Appeals for the District of Columbia has been governed by Rule 10 of the court, in effect to February 1, 1941, promulgated under authority of the Act of February 4, 1893, C. 74, 27 Stat. 434 as supplemented by the Act of July 30, 1894, C. 172, 28 Stat. 160; C 2, Section 25, Title 18, The Code of the District of Columbia. The Act of 1894 did not repeal the Act of 1893 and the authority to make rules "* * * for the taking of appeals to said Court," was the same that the Act of 1893 gave to make rules for the time and method of the entry of appeals.

This power has not been abrogated either by express or implied repeal in the Judiciary Act of 1925, above mentioned. The Court of Appeals of the District of Columbia

was specifically mentioned in that Act where Congress intended the Act to apply and perusal of the whole legislation will show that Congress did not refer to said court as a Circuit Court of Appeals. Section 8 (c) thereof did not mention the Court of Appeals of the District of Columbia.

B.

There is nothing in either Rule 10 of the United States Court of Appeals for the District of Columbia or in the Federal Rules of Civil Procedure providing for an extension of time for noting an appeal from a judgment properly entered. The Court of Appeals properly interpreted the Federal Rules of Civil Procedure, including Rule 77 (d), and applicable decisions of this Court condemning devices for extending the time for taking appeals.

The Trial Court properly settled the form of the judgment and directed that it be entered by the clerk on May 7, 1940 in accordance with Rule 58 of the Federal Rules of Civil Procedure. The clerk properly noted the judgment in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) *id.* Compliance with Rules 58 and 79 (a) was all that was necessary to make the judgment effective. Respondent contends that the twenty days for noting an appeal ran from this judgment as entered. Petitioner's contention that the failure of the clerk to make a note in the docket of the fact of mailing notice of the entry in accordance with Rule 77 (d) tolls the running of the 20 days for appeal disregards the plain meaning of Rules 58 and 79 (a) and would leave them meaningless.

The action of the Trial Court in vacating this judgment after the expiration of the 20 day period at the request of

petitioner because of the alleged failure of the clerk to comply with Rule 77 (d) and the reentering of a judgment in the same terms as of a later date was unwarranted and ineffective to extend the time for noting an appeal. The Court of Appeals properly granted the respondent's motion to dismiss after hearing the arguments on the motion to dismiss and the merits of the case.

ARGUMENT

A

Authority of the United States Court of Appeals for the District of Columbia to fix by rule a different time for reviewing judgments of the District Court of the United States for the District of Columbia than that prescribed for bringing any judgment before a Circuit Court of Appeals.

History of Legislation.

A brief history of Congressional legislation for the courts of the District of Columbia in connection with legislation for courts of the United States generally discloses that the Act of February 27, 1801, 2 Stat. 103, erected a Circuit Court of the District of Columbia and conferred all powers by law vested in Circuit Courts of the United States. The Act of March 3, 1863, C. 91, 12 Stat. at L. 762, abolished the Circuit, District and Criminal Courts of the District of Columbia and established the Supreme Court of the District of Columbia with the right of appeal from the special term of the Court to the general term. The court in general term was required to adopt such rules as it thought proper to regulate the time and manner of making appeals.

The Act of March 3, 1891, C 517, 26 Stat. 826, to establish Circuit Courts of Appeals throughout the country provided that no appeal was to be taken except within six months after the entry of judgment.

Creation of the Court of Appeals of the District of Columbia.

The Court of Appeals for the District of Columbia was established by the Act of February 9, 1893, C. 74, 27 Stat. 434, which provided in Section 6 that the Court was to make rules it deemed necessary for the transaction of business and for the time and method of the entry of appeals from the Supreme Court of the District of Columbia. In pursuance of the mandate of the statute the Court promulgated Rule IX found in 21 W. L. R. 275, 278, 1 App. D. C. V, XIV, which limited the time for taking appeals to 20 days, Sundays excluded, after the judgment complained of had been made or pronounced.

The Act of February 9, 1893, was amended by the Act of July 30, 1894, 28 Stat. 160, which expanded the powers of the Court of Appeals for the District of Columbia and provided in Section 6 of the Act, Title 18, C. 2, Section 25 of the Code of the District of Columbia, 1929, that the Court make rules and regulations necessary for the transaction of its business and the taking of appeals to said Court. It was given further power generally to regulate all matters relating to appeals in the Court below and in the Court of Appeals. The Court of Appeals by virtue of the acts of Congress promulgated Rule 10 on September 29, 1894, found in 4 App. D. C. V, XVII, which was the same as its former Rule IX.

It may well be argued that the refusal of Congress in the supplementary legislation of 1894 to withdraw the power of

the Court of Appeals of the District of Columbia to fix by court rule the time for entry of appeals exercised by the Court in its Rule IX, *supra*, and its reaffirmance of that power by directing the Court to make rules for the taking of appeals is a clear indication of the intent of Congress to leave this power in the Court. This rule-making power was specifically upheld by the Supreme Court of the United States in the case of *Ex Parte* Dante, 228 U. S. 429, 57 L. Ed. 905, 33 S. Ct. 579, decided on April 28, 1913, which recited that the Act of Congress of February 9, 1893 created and conferred power to make rules, that Rule 10 was promulgated providing for no appeal unless taken within 20 days after judgment and that such rule was still in force and was the only rule governing the time within which appeals from the Supreme Court of the District of Columbia were to be taken to said Court of Appeals.

The Effect of the Judiciary Act of 1925.

When Congress in the Act of February 13, 1925, C. 229, 43 Stat. 936, amended the Judicial Code and further defined the jurisdiction of the Circuit Courts of Appeals and stated other purposes it must be presumed to have had knowledge of the existence of the rules of the Court of Appeals of the District of Columbia interpreting the Acts of 1893 and 1894 to give that Court power to limit the time for taking appeals to 20 days from a judgment of the Supreme Court of the District of Columbia. Its express intention to amend only sections 128, 129, 237, 238, 239 and 240 of the Judicial Code further demonstrates this since none of those Judicial Code sections applied to the Court of Appeals of the District of Columbia. *Ex Parte Dante, supra*, involving the dismissal of an appeal from a judgment dated June 22, 1912 was decided after the enactment of the Judicial Code of 1911.

Congress in enacting the Judiciary Act of 1925 furnished abundant evidence that it did not intend the Court of Appeals of the District of Columbia to be governed by part 8 (c) of Section 240 prohibiting appeals more than three months after judgment. This section mentioned only " * * * a Circuit Court of Appeals * * * " Sections 239, 140 (a) and (c), 5 and 8 (b) used the terminology " * * * in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia * * * " Section 6 (a) applied to a Circuit Court of Appeals, while 6 (b) provided specifically for the Court of Appeals of the District of Columbia. Petitioner's attempt to stress on page 10 of his brief that Section 5 of that Act of 1925 applied to anything more than a bankruptcy case demonstrates the weakness of his argument.

Section 2 of the Act of 1925 refers only to " * * * a Circuit Court of Appeals * * * " in enumerating statutes such as the Federal Trade Commission Act appeals from which are included among the cases covered by Sections 239 and 240 of the Judicial Code. This Court in *Federal Trade Commission v. Klesner*, 274 U. S. 145, 71 L. Ed. 972, 47 S. Ct. 552 has held that the Federal Trade Commission Act, 38 Stat. 717, conferring jurisdiction in that Act on Circuit Courts of Appeals to enforce commission orders, included by interpretation the Court of Appeals of the District of Columbia. Congress was held not to intend that there should be no means of enforcement of that Act in the District of Columbia. The situation was different in *United States v. Burroughs*, 289 U. S. 159, 77 L. Ed. 1096, 53 S. Ct. 574, in which this Court held that a statute authorizing direct appeals from District Courts to the Supreme Court of the United States in certain criminal cases did not apply to the Supreme Court of the District of Columbia which had a statute providing generally for all appeals to be taken to

the Court of Appeals of the District of Columbia. The opinion stated further that implied repeals were not favored, and if effect could reasonably be given to both, the presumption was that the earlier was intended to remain in effect. See also, *Johnson v. United States*, 38 App. D. C. 347, 225 U. S. 405, 32 S. C. 752, 56 L. E. 1142; *Kleindienst v. United States*, 48 App. D. C. 190; *O'Brien v. United States*, 69 App. D. C. 135, 99 F. 2d. 368.

Status of United States Court of Appeals for the District of Columbia and Rule 10.

The Laws of 1893 and 1894, *supra*, were not embraced within this Judiciary Act of 1925; neither are they or Rule 10 of the Court of Appeals of the District of Columbia inconsistent with the act which limits the time for taking appeal to "* * * a Circuit Court of Appeals * * *" In *O'Donoghue v. United States*, 269 U. S. 516, 77 L. Ed. 1356, this Court said that Congress could establish inferior federal courts in the District of Columbia under the authority of Article III of the Constitution of the United States and that they are courts of the United States, but it is not required to make them district or circuit courts. *United States v. Burroughs*, *supra*, stated the distinction between district courts and courts of the United States, which latter phrase included the Supreme Court of the District of Columbia.[2] In any event it is not necessary to make this distinction when the organic act establishing the Court of Appeals of the District of Columbia gives it power to govern the taking of appeals and this power has not been expressly withdrawn. Regarding *Alaska Packers v. Pillsbury*, 301 U. S. 174, cited by petitioner, there was not a separate organic

[2] Name changed to District Court of the United States for the District of Columbia (June 25, 1936, 49 Stat. 1921, c. 804).

act creating the Court of Appeals in the Ninth Circuit and giving it the rule making power that was given the Court of Appeals of the District of Columbia. There was no doubt that it was a Circuit Court which was governed by Section 8(c) of the 1925 Judiciary Act fixing the method of applying for appeals.

The Act of June 7, 1934, C. 426 (48 Stat. 926), Public No. 298, specifically mentioned the organic Act of 1894 establishing the Court of Appeals for the District of Columbia and provided that it was to be amended to change the name of the court to the United States Court of Appeals for the District of Columbia. Thus Congress recognized that this Court had been created and had existed apart from Circuit Courts and that the Judiciary Act of 1925 had no effect on it to make it a Circuit Court of Appeals. The District of Columbia is not one of the named circuits set forth in all the legislation of Congress establishing the various circuits. That Congress in Title 11 U. S. C. A., Section 47 (A) mentioned "* * * Circuit Courts of Appeal of the United States and the United States Court of Appeals for the District of Columbia * * *" while in subsection (c) and in section 48 (a) it used the words "Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia" is indicative of a clerical error only on the face of the legislation and, of course, does not constitute it a Circuit Court of Appeals. The Federal Rules of Civil Procedure remove any vestige of doubt on this score in Rule 81 (d) which states that when reference is made in the rules to a Circuit Court of Appeals, the reference includes the United States Court of Appeals for the District of Columbia.

This Court may take judicial notice that the United States Court of Appeals for the District of Columbia, since the Judiciary Act of 1925, has continued to promulgate and use its Rule 10 limiting the time for taking appeals to 20 days under the authority of the Acts of 1893 and 1894 throughout the years. In the case of *Burke v. Canfield*, 72 App. D. C. 127, 111 F. 2d. 526, and in promulgation of its rules effective February 1, 1941, it recognized and exercised its power. Legislation once judicially or even administratively interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord and not at variance with the legislative intention. *Swigart v. Baker*, 229 U. S. 187, 57 L. Ed. 1143, 33 Sup. Ct. 645, *Bardwell v. Petty*, 52 App. D. C. 310, 286 F. 772, *United States ex rel. Queen v. Alvey*, 182 U. S. 456, 45 L. Ed. 1369, 37 S. Ct. 741. Rule 73 (a) of the Federal Rules of Civil Procedure providing for the simplified practice of filing a notice of appeal with the District Court within the time prescribed when an appeal is permitted by law to a Circuit Court of Appeals demonstrates careful draftsmanship in recognizing that there may be more than one law permitting appeals and prescribing time for noting them.

Thus, in conclusion of this phase of the argument, respondent contends that the United States Court of Appeals for the District of Columbia had ample authority to promulgate Rule 10 limiting the time for taking appeals to twenty days after judgment entered in the District Court of the United States for the District of Columbia.

B

The Court of Appeals has properly interpreted the Federal Rules of Civil Procedure and has properly applied decisions of this Court condemning the use of devices by courts to extend the time for taking appeals.

The Federal Rules of Civil Procedure.

The Trial Court properly made its finding of facts and conclusions of law in accordance with Rule 52 (a) of the Federal Rules of Civil Procedure (Exhibit C at R. 67, Tr. 32, 34). It properly settled the form of the judgment and directed that it be entered by the clerk in accordance with Rule 59 *id.* (Tr. 36). The clerk properly noted the judgment in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) *id.* (Tr. 36 and supplemental transcript of docket entries). Petitioner's filing of a notice of appeal June 3, 1940 (Tr. 37 and supplemental transcript) was six days after the 20 day limit for noting an appeal had expired. The Court of Appeals properly granted the motion to dismiss for failure of petitioner to note his appeal within time.

A failure of the clerk to serve a notice of the entry of the judgment by mail and make a note in the docket of the mailing in accordance with Rule 77 (d) *id.* would not affect the judgment. Performance of this duty was not a prerequisite to the effectiveness of the judgment or to the running of the period within which an appeal should have been taken. Compliance with Rules 58 and 79 (a) was sufficient to make the entry of judgment effective for all purposes. *Siegel v. Margiotta*, 102 Fed. 2d. 525. Since the judgment was properly of record a failure of the clerk to comply with Rule 77 (d) did not warrant the District Court's setting it aside. Its

action was ineffective to achieve an extension of time for appeal.

Petitioner's mention of Rule 6 (c) in his petition for certiorari was abandoned in his brief apparently because he realized that the 20 days for taking appeal had expired six days before notice of appeal on June 3, 1940 and probably also because he realized that the rule had no application since there is no requirement in the rules that an appeal be noted 20 days after service of notice of entry of judgment.

The prohibition of Rule 6 (b) against the District Court's enlarging the period for the taking of an appeal as provided by law is absolute. It cannot be accomplished by the secretive device of vacating the original judgment of May 7, 1940 on June 13, 1940 (Tr. 42, Exhibit C at R. 67, 69, supplemental transcript of record showing docket entries) and reentering an identical judgment as of June 13, 1940 (Tr. 41, supplemental transcript of record showing docket entries). Rule 10 of the Rules of the United States Court of Appeals for the District of Columbia in effect until February 1, 1941, which have the effect of law, makes no provision for extending the time for noting an appeal. Petitioner's admitted participation in the secret proceedings (paragraph two on page 2 of the Statement in the petition for certiorari) and his noting an appeal from the order of June 13, 1940 on June 14, 1940 (Tr. 43, supplemental transcript showing docket entries) was ineffective to accomplish this in the face of the record.

The omission of the clerk to mail the notice of entry of judgment, (if there had been such omission), and to make a note in the docket of the mailing was not a clerical mistake in the judgment itself within Rule 60 (a). The action of the

trial court in vacating the judgment for that reason (Tr. 42) was excessive and not in contemplation of the rule. There was no motion before the trial court to relieve a party or his legal representative from a judgment taken against him through his mistake, inadvertance, surprise, or excusable neglect within Rule 60 (b) (Exhibit A at R. 65, supplemental transcript). The only surprise petitioner has ever directly stated is that appearing on page 14 of his petition for certiorari where he argues that petitioner and counsel were surprised, not by the entry of the judgment, but " * * * by the irregular entry of the judgment * * * " It is possible to conclude that they were surprised to discover some clerical error after the time for appeal had been allowed to expire; the clerk had made a note of the mailing in the Day Book of Civil Division No. 3 beside the entry of the final decree rather than a note of mailing in the Civil Docket (statement). The mistake involved in the supposed omission to mail the notice of entry of judgment and the omission to make a note in the docket of the mailing was that of the clerk and not that of a party contemplated by Rule 60 (b).

It is apparent the action of the trial court referred to above in vacating the original order and reentering the same order as of a later date was surrounded by secrecy (Exhibit A at R. 65, Exhibit C at R. 67, 69, supplemental transcript). Thus the petitioner and the trial court treated the matter apparently as the correction of a clerical error and a device to extend the time for noting an appeal. That this was the intention was borne out by the later statement of the trial court that it did not wish to cut off anyone from his opportunity to have a review of its decision in the case (Exhibit B at R. 66). As stated above petitioner had filed no motion of any kind before the expiration of the twenty day period

for noting the appeal. The District Court properly denied petitioner's motion to enter judgment and direct clerk to notify parties filed after the twenty days had expired (Tr. 38, 39, 49, Supplemental Tr.) and there was no appeal from the denial of this motion. The situation is far different from that in *Leishman v. Associated Wholesale Electric Co.*, Law Ed. Adv. Opinions Vol. 87, No. 9, P. 495 decided after the opinion of the Court of Appeals in the instant case.

Application of Decisions of This Court.

The Court of Appeals properly applied two cases of this Court to the attempted action of the trial court to extend the time for noting the appeal. In *Credit Co. v. Ark. Central Ry.*, 128 U. S. 258, this Court held that the use of a *nunc pro tunc* order was ineffective to arrest or call back the time for taking an appeal which had expired; it could not make a dead letter of the law limiting the period for appeal. The trial court in the instant case arbitrarily vacated its judgment after the twenty period for appeal had expired and reentered it as of a later date so that petitioner could note his appeal from the later judgment. With such a record as exists in this case it would be difficult to think of a situation that called forth more strongly for the application of the rule of that case. The case of *Brooks v. Norris*, 11 How. 204, 52 U. S. 204, granted a motion to dismiss where it appeared of record that the writ of error was not issued until after the expiration of the five year period allowed from the day of the judgment for bringing writs of error. This Court upheld the granting of a motion to dismiss by the Court of Appeals of the District of Columbia for failure to note the appeal within the twenty days provided by Rule 10. *Ex Parte Dante, supra.*

The situation is analogous to that in the case of *United States v. East*, 80 F. 2d. 134, citing *Credit Co. v. Ark. Cent. Ry. supra.* The Court held that the entry of a new identical judgment after the expiration of 30 days from the date of the original judgment did not create another 30 day period for appeal, notwithstanding the fact that an *ex parte* petition for rehearing had been filed after expiration of the 30 day period and had been denied. This latter case was cited with specific approval in *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382, note 12, where this Court stated that if it appears that rehearing has been granted only for the purpose of extending the time for appeal the appeal must be dismissed. The correction of a clerical error in the entry of a judgment was held not to enlarge the time for taking an appeal from the original judgment. *Sterrett v. Shoemaker*, 47 App. D. C. 455.

No Ground for Certiorari.

The Court of Appeals below heard argument on the motion to dismiss at the hearing on the merits of the case and decided the same some time after arguments on the motion and the merits had been taken under advisement (R. 59, 60, 74, 79). It may be held that the Court of Appeals did not refuse to take jurisdiction, in which case petitioner's arguments for certiorari are without grounds. *Ex Parte First National Bank*, 228 U. S. 516, 57 L. Ed. 946, 33 S. Ct. 591.

Conclusion

The motion to dismiss of respondent for failure of petitioner to note his appeal within time was properly granted by the United States Court of Appeals for the District of

Columbia. There was authority for promulgation of its Rule 10. No question of general importance, nor question of substance relating to the Constitution, or a treaty or statute of the United States need be settled by this Court. There is nothing in the record to show that the Court of Appeals has not given proper effect to applicable decisions of this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FILE COPY

DEC 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED,

Petitioner,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR FRANCIS L. HAWES.

JOHN B. GUNION,
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PETITION FOR CERTIORARI FILED FEBRUARY 4, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED,

Petitioner,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT FRANCIS L. HAWES.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia is reported in 132 F. (2d) 569, 76 U. S. App. D. C. 308.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was dated October 12, 1942 (R. 39). The

petition for rehearing was denied November 4, 1942 (R. 39, 40). The mandate was issued January 7, 1943. Judgment on the mandate was entered February 4, 1943. The petition for a writ of certiorari was filed February 4, 1943. The jurisdiction of this court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and paragraph c of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States amended to May 26, 1941. Certiorari was allowed April 5, 1943.

Statement.

Respondent deems it necessary under authority of Rule 27 (d) to supply a full statement.

This case was brought on March 3, 1941 to the United States Court of Appeals for the District of Columbia on appeal from a decree of the District Court of the United States for the District of Columbia dismissing a complaint of petitioner. On June 4, 1941 the respondent, Francis L. Hawes, filed a motion to dismiss the appeal in the Court of Appeals upon the ground among others, that it was not noted in time (R. 11). Certain exhibits were attached to this motion, but they are not in the transcript in this court. Opposition was filed by petitioner (R. 18). A reply which is not in the transcript with an attached exhibit D (the same as Exhibit C attached to the renewal motion R. 27) was filed by respondent to the opposition. On November 13, 1941 this motion was denied without prejudice to the respondent's right to renew the same upon the single ground mentioned at the argument on the merits (R. 22). The motion was renewed (R. 23) and certain exhibits were attached thereto (R. 26, 27, 29, 30, 31). No opposition was filed by petitioner. The motion was argued at the time of the argument on the merits (R. 32). On October 12, 1942

the Court of Appeals granted the motion to dismiss (R. 39).

The facts pertinent to the grounds for the renewed motion to dismiss supported by the record, the uncontradicted exhibits and references to the transcript follow: Petitioner's complaint was filed in the District Court of the United States for the District of Columbia on December 2, 1939 (Tr. 1). The hearing of the case was had on April 19, 1940, with both parties introducing evidence and presenting testimony (Exhibit C, R. 27). The case was taken under advisement and on April 24, 1940 oral pronouncement was made in the presence of both parties in open court by the trial justice of the findings of fact, conclusions of law and nature of the decree to be drawn (Exhibit C, R. 27, 28). On May 1, 1940 petitioner handed in proposed written findings of fact and at the same time, in the presence of petitioner and the trial justice in his chambers, respondent handed in proposed written findings of fact, conclusions of law and decree for signature of the court (Exhibit C, R. 27, 28). On May 1, 1940, the same day, the trial judge, after study, indicated in the presence of counsel for both parties that it would then and there sign the findings of fact, conclusions of law and decree submitted by respondent. Mr. Johnson, counsel for the petitioner, objected and obtained a few days to submit further findings, which, however, were never submitted (Exhibit C, R. 27, 28). The respondent's proposed findings of fact, conclusions of law and decree dismissing the complaint, which had been retained by the court from May 1, 1940, were signed and filed by the court on May 7, 1940 (Tr. 32, 34; R. 1, 5). Petitioner's proposed findings of fact, which had also been retained by the court from May 1, 1940 but not adopted by it, were filed by the court on May 7, 1940 (R. 1).

This judgment was noted in the clerk's Civil Docket on May 7, 1940 as required by Rule 79 (a) of the Federal Rules

of Civil Procedure (R. 1). Notice of appeal was not filed until June 3, 1940 by petitioner (R. 1, 5).

No note in the Civil Docket of the mailing as required by Rule 77 (d) appears in the record (R. 1). However, the clerk's affidavit showed that he made a large letter "N" in the Day Book of Civil Division No. 3 beside the final decree entered in the book, which signified that notice of the entry of the final decree of May 7, 1940 was written up for mailing to the parties therein (R. 8 and 9, referred to in the renewed motion to dismiss at R. 25). It has been the uniform custom in the District Court and most courts for a messenger to pick up such notices and place them in the mail. There was no direct evidence that it either was or was not mailed in this case. Such facts are virtually impossible of exact proof but the presumption is that the custom prevailed.

In addition to the record notice of entry of the judgment in the Civil Docket there was advertisement of a foreclosure sale of the property involved in the suit to take place on June 4, 1940, which appeared publicly in the newspaper May 13, 18, 25, 28 and June 3, 1940. This was disclosed by the exhibits attached to the renewed motion to dismiss in the Court of Appeals (Exhibits E, F, at R. 30, 31). Publication of the entry of the decree dismissing suit appeared in the legal record of a public newspaper on May 8, 1940 (Tr. 48, referred to in the renewed motion to dismiss at R. 25). On June 3, 1940, the day before the scheduled foreclosure sale (R. 30), petitioner's attorney hinted that he was going to appeal the case. Respondent's attorney told him that petitioner could not apeal, that it was too late. Whereupon petitioner's attorney rejoined that petitioner had forty days from the date of the entry of judgment and that he did not know about the twenty day limit for taking appeals (See full statement in Exhibit C, at R. 27, 28).

The period for noting an appeal from the judgment of May 7, 1940 allowed by the rules of the Court of Appeals in effect at that time expired with no notice of appeal filed (R. 1). Petitioner filed a notice of appeal after the time had expired (R. 1, 5).

On June 6, 1940, after the time for appeal had expired and after petitioner had noted his appeal, petitioner filed a motion in the District Court to enter judgment and direct the clerk to notify parties (R. 6). This motion (R. 6) set forth the grounds that the clerk failed to enter the day or month of the judgment and that the clerk had failed to notify the parties of the action of the court. The motion was opposed by the respondent in amended points and authorities filed on June 7, 1940, which opposition included the reason that a foreclosure sale had been held in reliance on the finality of the judgment (Tr. 39, referred to at R. 13). The trial judge directed petitioner to withdraw this motion, which he failed to do (Exhibit C, R. 27, 29). Petitioner's allegation on page 2 of the petition for certiorari that the motion was heard in open court on June 13, 1940 is misleading and incorrect. Respondent was not notified of a hearing of any kind, on that date, had no knowledge of any such hearing and was not present. (Exhibit C, R. 27, 29; R. 35). The motion remained on the calendar and was subsequently heard and dismissed by another judge of the District Court on June 24, 1940 (R. 10). No appeal was taken by petitioner from or after the dismissal, which was entered on the Civil Docket (R. 1) in accordance with Rules 58, 79 (a) and 77 (d) of the Federal Rules of Civil Procedure.

Meanwhile, on June 13, 1940 the trial judge, in the absence of respondent and without notice or opportunity for respondent to be heard, entered an order vacating the judgment of May 7, 1940 (R. 7, 35; Exhibit C at R. 27, 29). The reason stated in the order was that the clerk failed to serve a notice of the entry of judgment by mail and failed

to make a note in the docket of the mailing in accordance with Rule 77 (d) of the Federal Rules of Civil Procedure (R. 7). The record does not show the filing of any motion or notice in writing to vacate the judgment of May 7, 1940 either before or after the expiration of the twenty day period for noting an appeal; the only entry in the record concerning vacation of the judgment of May 7, 1940 is that of the order of June 13, 1940 vacating the judgment (R. 1. Exhibit A at R. 26). On the same day, June 13, 1940, the trial judge, in the absence of respondent and without notice or opportunity for respondent to be heard, signed and filed a second judgment in the same terms as the one of May 7, 1940 (R. 7; Exhibit C, R. 27, 29). Petitioner on page 2 of his Statement in his petition for certiorari admits to this court that he took part in the ex parte proceedings.

On June 14, 1940 petitioner filed a notice of appeal from the judgment of June 13, 1940 (R. 8). Respondent filed a motion in District Court on June 24, 1940 to reconsider the order vacating the judgment of May 7, 1940 (R. 8, Tr. 44) with the above mentioned affidavit of the clerk (R. 9) and exhibit of the publication of the entry of the decree of May 7, 1940 in the public newspaper (R. 8, Tr. 48). No opposition was filed by petitioner. This motion was heard by the trial judge, who overruled it stating that he did not wish to be in the position of cutting off petitioner from an appeal from his decision (Exhibit B at R. 27). No order overruling this motion was entered by the trial judge (Exhibit A at R. 23). Respondent's attorney had drawn up an order overruling said motion when it became evident that the record was incomplete, and presented this order to petitioner's attorney for signing by the court and filing (Exhibit B at R. 27), which signing and filing was never consummated.

In conclusion, these uncontradicted facts were apparent of record or set forth in support of the renewal of the

motion to dismiss in the Court of Appeals in the form of exhibits attached thereto, including written certificates by respondent's counsel of record and clerks of the court, or references to the transcript and exhibits therein from the District Court.

Summary of Argument.

A.

The United States Court of Appeals for the District of Columbia properly dismissed the appeal of the petitioner for failure to file a notice of appeal within a 20 day period from the entry of judgment on May 7, 1940 in the District Court of the United States for the District of Columbia. Rule 10 of the Rules of the Court of Appeals provided that no judgment of the District Court of the United States for the District of Columbia or of any justice thereof was to be reviewed by the Court of Appeals unless the appeal was taken within 20 days after the judgment complained of had been made or pronounced.

Petitioner's contention that Section 8 (c) of the Act of February 13, 1925, 28 U. S. C. A. 230 (43 Stat. 936, c. 229) allowing three months for appeal to a circuit court of appeals, encompassed the United States Court of Appeals for the District of Columbia is without foundation. Whatever the parallelism it is not a circuit court of appeals.

The taking of appeals from the District Court of the United States for the District of Columbia to the United States Court of Appeals for the District of Columbia was governed by Rule 10 of the court, in effect to February 1, 1941, as amended December 16, 1936 under authority of the Act of February 9, 1893 (C. 74, 27 Stat. 434) and supplemented by the Act of July 30, 1894 (C. 172, 28 Stat. 160; C. 2, Section 25, Title 18, The Code of the District of Columbia). The Act of 1894 did not repeal the Act of 1893;

the authority to make rules for the *taking* of appeals was the same as that of the Act of 1893 to make rules *for the time and method* of the entry of appeals.

This power has not been abrogated either by express or implied repeal in the Judiciary Act of 1925, above mentioned. The Court of Appeals of the District of Columbia was specifically mentioned in that act where Congress intended, and perusal of the whole legislation will show that Congress did not refer to said court as a circuit court of appeals. Section 8 (c) thereof did not mention the Court of Appeals of the District of Columbia.

B.

There is nothing in either the Rules of the United States Court of Appeals for the District of Columbia or in the Federal Rules of Civil Procedure providing for an extension of time for noting an appeal from a judgment. Such action is prohibited by Rule 6 (b) of the Federal Rules of Civil Procedure. The Court of Appeals properly applied these rules, its own rules and the applicable decisions of this court in deciding that the time for appeal must not be extended in this case.

Petitioner, contrary to his statement that the court was responsible for delay (found on page 7 of the brief in support of his petition for certiorari), prevented the trial judge from signing the decree in petitioner's presence on May 1, 1940. He requested a postponement for a few days within which to file additional findings of fact, which were never filed (Exhibit C, R. 27, 28). This exhibit, attached to the renewal of the motion to dismiss in the Court of Appeals, was undenied there, and the Court of Appeals found as a fact in its decision that after the hearing in the District Court proposed findings were presented by both parties to the trial judge on May 1, 1940 (R. 33). On May

7, 1940 the trial judge signed respondent's proposed findings of fact, conclusions of law and decree from among the papers left with him on May 1, 1940 (Tr. 32, 34; R. 1). This was the action he stated on May 1, 1940 he would take unless petitioner filed more suitable findings within a few days (Exhibit C, R. 27, 28). Thus there was a period of one week during which petitioner should have filed further proposed findings, and not having done so, he must have expected the decree at the end of that time. The judgment was properly noted in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) of the Federal Rules of Civil Procedure.

Compliance with Rules 58 and 79 (a) of these rules was all that was necessary to make the judgment effective. Failure to comply with Rule 77 (d) in this case did not destroy its effectiveness. The period for noting an appeal ran from this judgment as entered. Petitioner failed to note an appeal within the time for appeal allowed by the Rules of the Court of Appeals. His notice of appeal filed after this time on June 3, 1940 (R. 1, 5) was too late.

Petitioner's attempt to gain more time within which to note an appeal by filing the motion of June 6, 1940 to enter judgment and direct clerk to notify parties (R. 6), on the grounds that the judgment had not been entered properly and that the clerk had failed to comply with Rule 77 (d), was of no avail. Respondent filed an opposition to this motion on June 7, 1940 (R. 1, Tr. 39). The motion was dismissed by order of the District Court June 24, 1940 (R. 1, 5).

Meanwhile, the petitioner and the trial court had bypassed the respondent (Exhibit C, R. 27, 29) in an attempt to enlarge or recall the time for appeal by vacating the judgment of May 7, 1940 on June 13, 1940 on the grounds of the failure of the clerk to comply with Rule 77 (d), (R. 7), and the reentry on June 13, 1940 of a judgment in the same

terms as the one of May 7, 1940 (R. 7). This was unwarranted and improper. Petitioner noted an appeal from this void judgment on June 14, 1940 (R. 8). Respondent had no notice of this and did not learn of it until after it had happened (Exhibit C, R. 27, 29). The device was ineffective to extend the time for noting an appeal and was a violation of Rule 6 (b), which prohibits enlargement of the period for taking an appeal.

There was no clerical mistake in the judgment of May 7, 1940 (R. 5) and no authority in Rule 60 (a) for the vacation of the judgment or the entry of a subsequent judgment similar in form (R. 7); nor did that rule provide for an enlargement of the time for an appeal. The alleged omission in failing to mail notice and the failure to make a note of the mailing in the Civil Docket was that of the clerk. In the facts of this case there was no motion filed or granted under authority of Rule 60 (b) for relief from a judgment, order or proceeding on the grounds of mistake, inadvertence, surprise or excusable neglect of petitioner or his attorney (R. 1, Exhibit A at R. 26, Exhibit C at R. 27, 29). Rule 60 (a) and (b) did not contemplate affecting appellate proceedings or enlargement of the period for taking an appeal. At no place in the Federal Rules of Civil Procedure where the period for taking an appeal was mentioned was a district court given the power to enlarge or affect the period for taking an appeal within the time prescribed by law. See Rules 73 (a) and 6 (b). Nor did the Rules of the Court of Appeals give that court or the District Court such power. It has been held many times over in decisions of this court that the time for appeal may not be extended.

The Court of Appeals properly granted respondent's motion to dismiss petitioner's appeal.

ARGUMENT.

A.

Authority of the United States Court of Appeals for the District of Columbia to fix by rule a different time for reviewing judgments of the District Court of the United States for the District of Columbia than that prescribed for bringing any judgment before a Circuit Court of Appeals.

History of Legislation.

A brief history of congressional legislation for the courts of the District of Columbia in connection with legislation for courts of the United States generally discloses that the Act of February 27, 1801 (2 Stat. 103) created a Circuit Court of the District of Columbia and conferred on it all powers by law vested in circuit courts of the United States. The Act of March 3, 1863 (C. 91, 12 Stat. at L. 762) abolished the Circuit, District and Criminal Courts of the District of Columbia and established the Supreme Court of the District of Columbia with the right of appeal from the special term of the court to the general term. The court in general term was required to adopt such rules as it thought proper to regulate the time and manner of taking appeals. The Act of March 3, 1891 (C. 517, 26 Stat. 826) to establish circuit courts of appeals throughout the country provided that no appeal was to be taken except within six months after the entry of judgment.

Creation of the Court of Appeals of the District of Columbia.

The Court of Appeals for the District of Columbia was established by the Act of February 9, 1893 (C. 74, 27 Stat. 434), which provided in Section 6 that the court was to make rules it deemed necessary for the transaction of business

and for the time and method of the entry of appeals from the Supreme Court of the District of Columbia. In pursuance of the mandate of the statute the court promulgated Rule IX (21 W. L. R. 275, 278, 1 App. D. C. V, XIV), which limited the time for taking appeals to a twenty-day period after the judgment complained of had been made or pronounced.

The Act of February 9, 1893 was amended by the Act of July 30, 1894 (28 Stat. 160), which expanded the powers of the Court of Appeals for the District of Columbia and provided in Section 6 (Title 18, C. 2, Section 25 of the Code of the District of Columbia, 1929) that the court make rules and regulations necessary for the transaction of its business and the taking of appeals to said court. It was given further power generally to regulate all matters relating to appeals in the court below and in the Court of Appeals. The Court of Appeals by virtue of the acts of Congress promulgated Rule 10 on September 29, 1894, (4 App. D. C. V, XVII), which was the same as its former Rule IX.

It may well be argued that the refusal of Congress in the supplementary legislation of 1894 to withdraw the power of the Court of Appeals of the District of Columbia to fix by court rule the time for entry of appeals, exercised by the Court in its Rule IX, *supra*, and its reaffirmance of that power by directing the court to make rules for the taking of appeals is a clear indication of the intent of Congress to leave this power in the court. This rule-making power was specifically upheld by the Supreme Court of the United States in the case of *Ex Parte Dante*, 228 U. S. 429, 57 L. Ed. 905, 33 S. Ct. 579, decided on April 28, 1913, which recited that the Act of Congress of February 9, 1893 created and conferred power to make rules, that Rule 10 was promulgated providing for no appeal unless taken within 20 days after judgment and that such rule

was still in force and was the only rule governing the time within which appeals from the Supreme Court of the District of Columbia were to be taken to said Court of Appeals. Section 6 of the Act of 1894, *supra*, was thus read into the Act of 1893, *supra*.

THE EFFECT OF THE JUDICIARY ACT OF 1925.

When Congress in the Act of February 13, 1925 (C. 229, 43 Stat. 936) amended the Judicial Code and further defined the jurisdiction of the circuit courts of appeals and stated other purposes it must be presumed to have had knowledge of the existence of the Rules of the Court of Appeals of the District of Columbia interpreting the Acts of 1893 and 1894 as giving that court power to limit the time for taking appeals to 20 days from a judgment of the Supreme Court of the District of Columbia. Its express intention to amend only Sections 128, 129, 237, 238, 239 and 240 of the Judicial Code further demonstrates this; since none of those Judicial Code sections applied to the Court of Appeals of the District of Columbia. *Ex Parte Dante*, *supra*, involving the dismissal of an appeal from a judgment dated June 22, 1912, was decided after the enactment of the Judicial Code of 1911.

Congress in enacting the Judiciary Act of 1925 furnished abundant evidence that it did not intend the Court of Appeals of the District of Columbia to be governed by Section 8 (c) prohibiting appeals more than three months after judgment. This section mentioned only "a circuit court of appeals". Sections 239, 240 (a) and (c), 5 and 8 (b) used the terminology "in a circuit court of appeals, or in the Court of Appeals of the District of Columbia". Section 6 (a) applied to a circuit court of appeals, while 6 (b) provided specifically for the Court of Appeals of the District of Columbia. Section 5 of the Act of 1925 applied only to bankruptcy cases, for it was the clear intention of Con-

gress to specifically mention the Court of Appeals of the District of Columbia at each point where the act applied to that court. Petitioner's argument concerning Section 5 on page 10 of his brief omits consideration of this factor. See also 42 Harvard L. R. 2, note 3.

Section 2 of the Act of 1925 refers only to "a circuit court of appeals" in enumerating statutes such as the Federal Trade Commission Act, appeals from which are included among the cases covered by Sections 239 and 240 of the Judicial Code. This court in *Federal Trade Commission v. Klesner*, 274 U. S. 145, 71 L. Ed. 972, 47 S. Ct. 552, has held that the Federal Trade Commission Act (38 Stat. 717), conferring jurisdiction in that act on circuit courts of appeals to enforce commission orders, included by interpretation the Court of Appeals of the District of Columbia. Congress was held not to intend that there should be no means of enforcement of that act in the District of Columbia. The situation was different in *United States v. Burroughs*, 289 U. S. 159, 77 L. Ed. 1096, 53 S. Ct. 574, in which this court held that a statute authorizing direct appeals from district courts to the Supreme Court of the United States in certain criminal cases did not apply to the Supreme Court of the District of Columbia, which was governed by a statute providing generally for all appeals to be taken to the Court of Appeals for the District of Columbia. The opinion stated further that implied repeals were not favored, and if effect could reasonably be given to both, the presumption was that the earlier statute was intended to remain in effect. (31 Stat. 1189, ch. 854, Section 1, March 3, 1901, provided that all general acts of Congress not locally inapplicable in the District of Columbia or by their terms applicable to the District of Columbia in force on March 4, 1901 remained in force except insofar as the same were inconsistent with or replaced by subsequent legislation.) The court further stated that Title

18, Section 43 of the *District of Columbia Code*, providing that the Supreme Court of the District of Columbia was to be deemed a court of the United States, was not such a designation as to constitute it a district court; and this statute giving it the same jurisdiction and powers as district courts of the United States, which satute was held to be applicable to appellate proceedings also, did not make it a district court of the United States. Therefore, while the Court of Appeals may have the powers of a circuit court of appeals, it is not a circuit court of appeals. For the proposition that statutes designed specifically for the District of Columbia prevail over federal statutes of general application where the two are inconsistent, see *Johnson v. U. S.*, 38 App. D. C. 347, 225 U. S. 405, 32 S. C. 752, 56 L. E. 1142; *Kleindienst v. U. S.*, 48 App. D. C. 190; *O'Brien v. U. S.*, 69 App. D. C. 135, 99 F 2d 368. In *Britton v. Maryland Casualty Co.*, No. 8321 in the United States Court of Appeals for the District of Columbia, a motion to dismiss was granted without opinion despite the making of the same argument by appellant that petitioner makes here.

In this case the Acts of 1893 and 1894, *supra*, in conjunction with Rule 10 of the Court of Appeals, which rule has the effect of law, were the local legislation which prevailed over the general legislation in Section 8 (c) of the Judiciary Act of 1925.

For the policy and reason underlying the intention of Congress to permit this difference between circuit courts of appeal and the United States Court of Appeals for the District of Columbia we may consider several interesting factors. The District of Columbia has been treated separately in a number of legislative matters dealing with the same or similar subject matter found in federal statutes generally and it has been given a separate code of laws. See *Johnson v. U. S.*, *supra*; *Kleindienst v. U. S.*, *supra*;

and *O'Brien v. U. S., supra.* The courts of the District of Columbia have a peculiar legislative history as discussed above and have been looked upon as being created under authority of Article II, Section 10 of the Constitution as well as Article III of the Constitution. *Keller v. Potomac Electric Company*, 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445. The work of the Court of Appeals in sitting as an administrative tribunal must have had some influence on legislation for it. The jurisdiction of the District Court of the United States for the District of Columbia for a long time embraced cases involving more than one thousand dollars. This has only recently been changed so that the jurisdiction in that respect conforms to the three thousand dollar minimum of district courts of the United States. See Municipal Court Act, Public law 512, Sec. 4 (a), approved April 1, 1942, 70 W. L. R. 316, p. 320. It is interesting to note that in the Rules of the Municipal Court of Appeals for the District of Columbia, effective September 13, 1942, Rule 27 (a) allowed only ten days from the date of the judgment to note an appeal. The rule was promulgated under general authority in Sec. 7 (b) of the act to regulate all matters relating to appeals, which was analogous to Sec. 6 of the Act of July 30, 1894, *supra.* This demonstrates the tendency to effect an early termination of legislation involving smaller amounts of money. We can believe that Congress had this in mind when it did not include the Court of Appeals for the District of Columbia in Section 8 (c) of the Judiciary Act of 1925.

The point at which litigation shall become final can be determined by the legislative power of the state, for the right of appeal is not essential to due process of law. *Standard Oil Company v. Missouri*, 224 U. S. 270, p. 287, 32 S. Ct. 406, 56 L. Ed. 760. Where the legislature gives this power to the courts under their rule making power it must be exercised properly with a view to terminating litigation at

a definite point. Litigation at its best is burdensome and society must protect itself from uncertain, lengthy and highly technical protagonism.

Status of United States Court of Appeals for the District of Columbia and Rule 10.

The Laws of 1893 and 1894, *supra*, were not embraced within the Judiciary Act of 1925, which limits the time for taking appeal to "a circuit court of appeals". In *O'Donoghue v. United States*, 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740, this court said that Congress could establish inferior federal courts in the District of Columbia under the authority of Article III of the Constitution of the United States and that they are courts of the United States. It is not required to make them district or circuit courts, *Lockerty v. Phillips*, 63 S. Ct. 1019. *United States v. Burroughs*, *supra*, stated the distinction between district courts and courts of the United States, which latter phrase included the Supreme Court of the District of Columbia.[1] In any event it is not necessary to make this distinction when the organic act establishing the Court of Appeals of the District of Columbia gave it power to govern the taking of appeals and this power has not been expressly withdrawn. Regarding *Alaska Packers v. Pillsbury*, 301 U. S. 174, cited by petitioner, there was not a separate organic act creating the Court of Appeals in the Ninth Circuit and giving it the rule-making power that was given the Court of Appeals of the District of Columbia. There was no doubt that it was a circuit court of appeals which was governed by Section 8 (c) of the 1925 Judiciary Act fixing the method of applying for appeals.

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[1] Name changed to District Court of the United States for the District of Columbia (June 25, 1936, 49 Stat. 1921, c. 804).

The Act of June 7, 1934 (C. 426, 48 Stat. 926, Public No. 298) specifically mentioned the organic Act of 1893 establishing the Court of Appeals for the District of Columbia and provided that it was to be amended to change the name of the court to the United States Court of Appeals for the District of Columbia. Thus Congress recognized that this court had been created and had existed apart from circuit courts and that the Judiciary Act of 1925 had no effect on it to make it a circuit court of appeals. The District of Columbia is not one of the named circuits set forth in all the legislation of Congress establishing the various circuits. That Congress in Title 11 U. S. C. A., Section 47 (a) mentioned "circuits courts of appeal of the United States and the United States Court of Appeals for the District of Columbia" while in subsection (c) and in Section 48 (a) it used the words "Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia" is indicative of a clerical error only on the face of the legislation and, of course, does not constitute it a circuit court of appeals. The Federal Rules of Civil Procedure remove any vestige of doubt on this score in Rule 81 (d) which states that when reference is made in the rules to a circuit court of appeals, the reference includes the United States Court of Appeals for the District of Columbia, thus indicating that there is a difference. This is further borne out by T. 28, U S. C. A., Section 17 (56 Stat. 1094, as amended December 29, 1942). This statute, for certain specific purposes only, deemed the District of Columbia to be a judicial circuit, namely, for the assignment of justices to overburdened courts. The justices of the United States Court of Appeals for the District of Columbia were by this statute and for these certain purposes deemed to be circuit judges.

This court may take judicial notice that the United States Court of Appeals for the District of Columbia, since the Judiciary Act of 1925, has continued to promulgate and use its Rule 10, limiting the time for taking appeals to a twenty day period, under the authority of the Acts of 1893 and 1894 throughout the years. The Rules of the United States Court of Appeals for the District of Columbia were revised December 1, 1927. In the reprint of December 16, 1936 Rule 10 provided:

> "Time and Manner of Allowing Appeals to This Court—
>
> 1. No order, judgment or decree of the District Court or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within 20 days after the order, judgment or decree complained of shall have been made or pronounced."

In the case of *Burke v. Canfield*, 72 App. D. C. 127, 111 F. 2d 526, and in promulgation of its rules effective February 1, 1941, 72 App. D. C. 409, the court recognized its power. Legislation once judicially or even administratively interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord and not at variance with the legislative intention. *Swigart v. Baker*, 229 U. S. 187, 57 L. Ed. 1143, 33 Sup. Ct. 645; *Bardwell v. Petty*, 52 App. D. C. 310, 286 F. 772; *United States ex rel. Queen v. Alvey*, 182 U. S. 456, 45 L. Ed. 1369, 37 S. Ct. 741; *Chewning v. District of Columbia*, 73 App. D. C. 392, 119 F. 2d 459. Petitioner did not raise the question until he filed a petition for rehearing of the Court of Appeals decision.

While Rule 10 of The General Rules of the United States Court of Appeals for the District of Columbia, effective

February 1, 1941, allowed 30 days for noting an appeal. Rule 10 of the Court of Appeals allowing less time for taking an appeal was in effect until January 31, 1941 and was the law which governed this case.

Thus, in conclusion of this phase of the argument, respondent contends that the United States Court of Appeals for the District of Columbia had ample statutory authority to promulgate Rule 10 limiting the time for taking appeals to a twenty day period after judgment entered in the District Court of the United States for the District of Columbia.

B.

The Court of Appeals properly decided under the Federal Rules of Civil Procedure that a judgment was effective when noted in the civil docket in accordance with rules 58 and 79 (a) and that the device of the trial judge to extend the time allowed for appeal by Rule 10 of the Court of Appeals was ineffective.

ORIGINAL JUDGMENT FINAL.

As set forth in the Statement, supra, petitioner had a full hearing of the case before the trial court on April 19, 1940. He was present on April 24, 1940 when the trial judge made oral pronouncement of the findings of fact and conclusions of law (Exhibit C, R. 27) and directed the parties to prepare proposed findings of fact, conclusions of law and a decree. The parties were later afforded on May 1, 1940, an opportunity to hand in proposed findings (Exhibit C, R. 27, 28). Petitioner and respondent through counsel were present on May 1, 1940 in the trial justice's Chambers when the judge decided then and there to sign respondent's proposed findings of fact, conclusions of law and decree dismissing suit rather than petitioner's proposed findings of fact (Statement, supra). Petitioner

effectively prevented this by requesting a few days within which to submit additional findings of fact and his conclusions of law (Exhibit C, R. 27). Petitioner was afforded due process of law, *Morgan* v. *United States*, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773. When petitioner failed to avail himself of this opportunity he must have known that the decree left in the possession of the trial judge would be signed at the expiration of those few days. The trial court held the petitioner's proposed findings of fact and respondent's proposed findings of fact, conclusions of law and decree until May 7, 1940 when he signed and filed the said papers submitted by respondent and filed the said findings of fact submitted by petitioner (R. 1, 5, Tr. 32, 34). If petitioner had ever intended to file additional findings of fact or conclusions of law promptly he would have discovered the entry of the judgment filed and noted in the Civil Docket on May 7, 1940 (R. 1, 27, 28). Petitioner should be estopped to complain about any alleged lack of notice of the entry of the decree. His delay amounted to a waiver. These facts set forth above and others following appeared in the references to the record and in the exhibits attached to the renewal of the respondent's motion to dismiss in the Court of Appeals, were uncontradicted there by petitioner and taken as undenied, *MacFarland* v. *Poulos*, 32 App. D. C. 558, p. 561; *American Wood Paper Co.* v. *Heft*, 131 U. S. XCII.

Thus the trial court properly made and filed its findings of fact and conclusions of law in accordance with Rule 52 (a) of the Federal Rules of Civil Procedure (Tr. 32, 34; Exhibit C, R. 27, 28). It properly settled the form of the judgment and directed that it be entered by the clerk in accordance with Rule 58 (R. 5). The clerk properly noted the judgment in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) requiring the clerk to note judgments chronologically in the Civil Docket and show the date that

notation was made (R. 1). The judgment was then entered and it was effective for all purposes from that time on, Rule 58.

The Rules of the United States Court of Appeals for the District of Columbia, promulgated December 16, 1936 and in effect until January 31, 1941, provided that no judgment of the District Court could be reviewed by the Court of Appeals unless the appeal was taken within the twenty day period after judgment was made or pronounced. This rule was still in effect after the Federal Rules of Civil Procedure. *Burke* v. *Canfield*, 72 App. D. C. 127, 111 Fed. 2d 526, decided April 17, 1940. Rule 10 of the Court of Appeals had the effect of law. *Ex parte Dante*, 228 U. S. 429, 57 L. Ed. 905, 33 S. Ct. 579. There was no statute or rule extending the time for appeal, *Ex parte Dante*. Rule 73 (a) of the Federal Rules of Civil Procedure required the taking of an appeal within the time prescribed by law. There was no provision for extending the time for appeal in Rule 73. *Burke* v. *Canfield*, supra. Rule 6 (b) of the Federal Rules prohibited district courts from enlarging the period for taking an appeal as provided by law. Petitioner's filing of a notice of appeal on June 3, 1940 (R. 1, 5) was after the time for appeal had expired. That petitioner's appeal was too late was undoubted and undisputed.

Analysis of Rule 77 (d).

Rule 77 (d) of the Federal Rules of Civil Procedure provides that immediately upon the entry of judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the Civil Docket of the mailing. It is significant that the last sentence of the rule provides that such mailing is sufficient notice for all purposes for which notice of entry of an order is required by these rules. The alleged failure

of the clerk to serve a notice of the entry of a judgment in the Civil Docket by mail and his alleged further failure to make a note in the docket of the mailing in accordance with this rule would not destroy the effectiveness of the judgment. Rules 58 and 79 (a). Performance of the duty to serve a notice of the entry was not a prerequisite to the effectiveness of the judgment or to the running of the period within which an appeal should have been taken. *Siegel* v. *Margiotta*, 102 Fed. 2d. 525, is a recent case which touches on the problem. See, also, *New Federal Procedure and the Courts* by Holtzoff, 1940, pages 155, 156, note 4; *Rosenberg* v. *Heffron*, 131 Fed. 2d. 80. Compliance with Rules 58 and 79 (a) was sufficient to make the entry of judgment effective for all purposes in this case. The judgment was appealable according to Rule 54 (a).

Rule 77 (d) cannot be said to be the same as Equity Rule 4 as contended by petitioner. The wording is distinctly different. It is interesting to recall that the old equity rules in existence prior to November 4, 1912 provided in Rule 4 that, except in cases where personal or other notice was especially required or directed, entry in the order book was sufficient notice to the parties and their solicitors. See comment, 28 U. S. C. A. Sec. 723. For whether the District of Columbia was governed by these Federal Equity Rules see *Curriden* v. *Middleton*, 232 U. S. 633, 34 S. Ct. 458, 58 L. Ed. 765. Compare *Shaw* v. *Lane*, 47 App. D. C. 170.

The Federal Rules of Civil Procedure marked a great advance in court procedure and were intended to liberalize with a view to having cases disposed of at one trial fairly and expeditiously, not to plague the parties, the courts, the bar and the public with uncertain and long delayed justice because of mere technicalities. For instance, Rules 4 and 5, which liberalized methods of service, stated that failure to make proof of service was not fatal. It is interesting to note that Rule 4 (h) allowed proof of service to be amended

at any time. In view of the absence of any such provision in Rule 77 (d) it is apparent that the duty to mail and place a note in the docket of the mailing have no effect on the proceedings in a case. Since notice had been prepared for mailing as signified by the clerk's placing an "X" in the Day Book (Statement supra), this Court can see that under Rule 60 (a) the Civil Docket should be considered as automatically containing this "X" beside the entry of the decree of May 7, 1940. For further comparison, notification of the filing of an appeal should be mailed by the clerk according to Rule 73 (b), but his failure to do so would not affect the validity of the appeal.

The Device.

Petitioner seized upon the failure of the clerk to place the "X" in the Civil Docket to attempt to upset a final determination of litigation. He deserved the prize popcorn whistle of the year, which he mentions on page 13 of his brief for certiorari.

Upon learning that the appeal he noted June 3, 1940 (R. 1, 5) was too late, petitioner in an attempt to gain more time within which to note an appeal filed a motion in the District Court to enter judgment and direct the clerk to notify parties. This was on June 6, 1940 (R. 6). Respondent opposed this motion in amended points and authorities filed June 7, 1940 (Tr. 39). The trial court requested petitioner to withdraw the motion, which was not done (Exhibit C, R. 27, 29). It remained on the motions calendar and was called for hearing for the first time before Justice O'Donoghue of the District Court. This judge entered an order on June 24, 1940 dismissing the motion (R. 10). The notation of the order was entered in the Civil Docket (R. 1) in accordance with Rules 79 (a) and 77 (d).

Meanwhile the trial court, in order to give respondent an opportunity to note an appeal, entered an order vacating

the judgment of May 7, 1940 on the grounds that the clerk failed to serve a notice of the entry of the judgment by mail on the petitioner and to make a note in the Civil Docket of the mailing (R. 7). This order was filed on June 13, 1940 (R. 1, 7), after the expiration of the time for appeal from the final judgment entered on May 7, 1940 (R. 5). The trial court then filed on June 13, 1940, the same day, a judgment different in form but identical in substance to that filed on May 7, 1940 (R. 7). This took place after the time for appeal had expired. Respondent had no notice or knowledge of this ex parte maneuver until after it had occurred (Exhibit C, R. 27, 29). Petitioner suddenly finding virtue in promptness noted an appeal on June 14, 1940, from this second judgment in the case (R. 8). The prohibition of Rule 6 (b) against the District Court's enlarging the period for the noting of an appeal as provided by law was absolute. It was not to be circumvented by the device of vacating the original judgment and reentering the judgment as of a later date. Petitioner, on page 2 of his petition for certiorari, admitted taking part in this ex parte proceeding by preparing the order vacating the judgment. No notice or motion had been filed to accomplish this (Exhibit A, R. 26, R. 1) and it came as a complete surprise to respondent (Exhibit C, R. 27, 29). The device did not cure the failure to comply with Rule 73 (a) requiring the filing of a notice of appeal from the original judgment within the time prescribed by law. The law mentioned in Rule 73 (a) was in this case Rule 10 of the Court of Appeals and the twenty days for appeal ran from the entry of the judgment of May 7, 1940, which had been entered in the Civil Docket in accordance with Rules 58 and 79 (a). The recitation in the grounds of the order of vacation that the clerk had failed to mail notice of entry of judgment and make a note in the docket of the mailing disclose on the face of the record the nullity of the action (R. 7), since Rules 58 and 79 (a) had

been complied with. In *Freid* v. *McGrath*, 76 U. S. App. D. C. 388, 133 Fed. 2d. 350 the order granting a motion for a new trial disclosed the fallible reasons of the trial court. The second judgment was void and beyond the jurisdiction of the court in the case at bar.

The omission of the clerk to mail the notice of entry of judgment, if it be assumed there had been such omission, and the omission to make a note in the docket of the mailing was not a clerical mistake in the judgment itself within Rule 60 (a). This rule did not contemplate enlarging the time for appeal. That such was the intention of the trial court was demonstrated by its later statement in open court on hearing respondent's motion to reconsider its action (R. 8, Tr. 44) that having been the judge to decide the merits of the case it did not wish to be in the position of cutting petitioner off from an appeal from its decision (Exhibit B, R. 27). The trial judge apparently did not think that the district court ought to have such power in its hands. A mere correction of a clerical error did not extend the time for appeal. See *Sterrett* v. *Shoemaker*, 47 App. D. C. 455. The spirit of the Federal Rules of Civil Procedure is to achieve finality of litigation. Rule 59, subdivisions (a), (b), (c) and (d) strive for this by limiting not only parties but judges as well. *Fried* v. *McGrath*, supra. See for the analogous rule in appellate proceedings *Burke* v. *Canfield*, supra, in which the opinion urged the courts and bar to recognize that infinite mischief results from violation of rules limiting time. Rule 61 directs that no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for setting aside a verdict or for vacating or otherwise disturbing a judgment unless refusal to take such action appears to be inconsistent with substantial justice. All throughout is demonstrated a strong policy for finality and limitation on the power of a court to keep litigants indefinitely under the cloud of a law

suit. Rule 60 (a) contemplates correction of clerical mistakes, oversights or omissions in judgments, orders, or other parts of the record by penmanship and mechanical means. Such a correction would not create new substantial rights, but would merely make the record disclose what in fact had transpired.

There was no motion before the trial court to vacate the judgment or relieve a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect within Rule 60 (b), nor did the trial court's order vacating the judgment make such a finding (R. 7, Exhibit C, at R. 27, 29). Petitioner did not explain why he failed to file additional findings, nor did he allege that he had been surprised or neglectful, mistaken or inadvertent. He chose to rely on the mistake of the clerk.

The opinion of the Court of Appeals (R. 33, 36) expressly found that there was no motion under Rule 60 (b) to relieve a party or his legal representative from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. Compare Rule 55 (c) for setting aside a default judgment for good cause shown or for reasons in accordance with Rule 60 (b). There was no default judgment. Petitioner was the plaintiff below and had his full day in court. Petitioner chose to instigate and carry out the summary method of attempted enlargement of the time for appeal rather than state his reasons for relief under Rule 60 (b) with an opportunity for all to partake in an open hearing. The respondent sought to obtain a reconsideration (Tr. 44, R. 8) to no avail. No blame can attach to respondent. It is too late to rectify these irregular and invalid proceedings initiated by petitioner and he is bound by them.

On the facts of this case it was not necessary to decide whether or not proceedings under Rule 60 (b) could result

in an enlargement of the time for noting an appeal. However, it is clear that this rule cannot be used for the purpose of enlarging the period for appeal. Rule 73 (a), directing the method for appealing from a judgment, stipulates that a party may appeal within the time prescribed by law. The Federal Rules of Civil Procedure have mentioned appeals often, but have not provided for enlarging the period for taking an appeal in any place where appeals are mentioned, nor anywhere in the rules. The omission to do so is very significant and prohibition of this power to the district courts was made absolute by Rule 6 (b) with no exceptions. It is interesting to note that Rule 32 (b) (2) of the General Rules of the United States Court of Appeals for the District of Columbia, effective February 1, 1941, 72 App. D. C. 425, incorporated the prohibition of said Rule 6 (b) against the extension of time for noting an appeal.

Under the California Civil Code, which was a guide for the Federal Rules of Civil Procedure, it has been held that no notice need be given of the rendition or entry of judgment in order to start the statute of limitations running against the time for appeal. *Lawson v. Guild*, 215 Cal. 378, 10 P. 2d 459; *Schainman v. Kierce*, 199 Cal. 249, 248 P. 905; *Palomar Refining Co. v. Prentice*, 47 Cal. App. 572, 118 P. 2d 322. A comparison may also be made between Section 473 of the California Civil Code and Rule 60 (b). In *Vale v. Maryland Casualty Co.*, 101 Cal. A. 599, 281 P. 1058, a motion to vacate a decree on the grounds of surprise was filed and denied. The order denying the motion was vacated the same afternoon "*ex parte and without notice to the adverse party or his attorney.*" That decision, as did the opinion of the Court of Appeals in the instant case, declared the order of vacation clearly void. The California cases and innumerable federal and state cases declare that the time for appeal is jurisdic-

tional and should not be extended. *Williams v. Long*, 130 Cal. 58, 62 P. 264. Compare *In Re Andrew's Guardianship*, 17 Cal. 2d 500, 110 P. 2d 399.

Application of Decisions of This Court.

The Court of Appeals properly applied two cases of this court to the attempted action of the trial court to extend the time for noting the appeal. In *Credit Co. v. Ark. Central Ry.*, 128 U. S. 258, this court held that the use of a *nunc pro tunc* order was ineffective to arrest or call back the time for taking an appeal which had expired; it could not make a dead letter of the law limiting the period for appeal. The trial court in the instant case vacated its judgment after the twenty day period for appeal had expired and reentered it as of a later date so that petitioner could note his appeal from the later judgment. With such a record as exists in this case it would be difficult to think of a situation that called forth more strongly for the application of the rule of that case. The case of *Brooks v. Norris*, 11 How. 204, 52 U. S. 204, granted a motion to dismiss where it appeared of record that the writ of error was not issued until after the expiration of the five year period allowed from the day of the judgment for bringing writs of error. This court upheld the granting of a motion to dismiss by the Court of Appeals of the District of Columbia for failure to note an appeal within the twenty days provided by Rule 10. *Ex Parte Dante, supra.*

The situation was analogous to that in the case of *United States v. East*, 80 Fed. 2d 134, citing *Credit Company v. Ark. Cent. Ry.*, supra. The court held that the action of the trial court in granting a rehearing, after the time for appeal from the judgment had expired, for the purpose of relieving counsel for the government from his error in not placing certain records in evidence necessary for appeal,

and then entering another order denying the claim as of a later date was ineffectual to extend the time for appeal. The East case was cited with specific approval in *Wayne Gas Company v. Owens Company*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382, Note 12, where this court stated that if it appears that rehearing has been granted only for the purpose of extending the time for appeal the appeal must be dismissed.

Since petitioner did not request and the District Court did not see fit to order a rehearing of the case on the merits or substantially alter the findings or decision on the merits, there was no tolling of the running of the appeal period. There was no power to toll or call back the appeal period as was done in the bankruptcy case of *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177. In *Gersing v. Chafitz*, — App. D. C. —, 133 F. 2d 384, the court referred to the *Bowman* case as decided prior to the Federal Rules of Civil Procedure and said that, assuming without deciding that under the Federal Rules of Civil Procedure an untimely petition for rehearing of the merits stays the running of the period for appeal, the appeal was too late in any event upon expiration of the time calculated for appeal from the denial of the motion for new trial. The *Bowman* case was distinguished as applicable only to bankruptcy cases arising prior to the New Federal Rules of Civil Procedure in *Safeway Stores Inc. v. Coe*, — App. D. C. —, 136 F. 2d 771. The court decided the assumed question in the *Gersing* case, supra, namely, that the filing of a petition for rehearing after the time for appeal had expired was ineffective to start a new appeal period although the trial court considered the petition before denying it. The court found that Rule 59 (b) of the Federal Rules of Civil Procedure limits the time for filing petitions for rehearing as well as motions for new trial and that Rule 6 (b) was an absolute

prohibition against extending the time. The case of *Leishman v. Associated Wholesale Electric Co.*, 87 L. Ed. 495, — U. S. —, — S. Ct. —, is distinguishable, for in that case there was a timely motion in the district court to alter in substance the court's findings of fact on the merits of the case, not an ex parte proceeding after the time for appeal attempting to use the correction of a clerical error to extend the time for appeal. The opinion in the Leishman case carefully avoided application of its decision to a purely mechanical or formal amendment to the findings. See *Department of Banking v. Pink*, 87 L. Ed. 218, — S. Ct. —, — U. S. —.

Conclusion.

Respondent's renewal of the motion to dismiss for failure of petitioner to note his appeal within time was properly granted by the United States Court of Appeals for the District of Columbia. There was statutory authority for promulgation of its Rule 10. The decision was a correct interpretation of the Federal Rules of Civil Procedure in relation to the facts of this case. It is respectfully argued that the decision should be affirmed.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED,

Petitioner,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

RESPONDENT'S PETITION FOR REHEARING.

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PETITION FOR CERTIORARI FILED FEBRUARY 4, 1943.
CERTIORARI GRANTED APRIL 5, 1943.
DECISION RENDERED JANUARY 3, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED,

Petitioner,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

RESPONDENT'S PETITION FOR REHEARING.

Respondent, Francis L. Hawes, respectfully requests a rehearing for the reason that the majority opinion in this case rests on an incorrect conception of the facts concerning the clerk's sending notice of entry of the decree of May 7, 1940.

Respondent has never agreed that no notice of the entry of the decree of May 7, 1940 was sent out. This court in its majority opinion recites that there was such agreement. In pleadings in the trial court (R. 8 and 9), court of appeals (paragraph 7 on R. 25, referring to unprinted Tr. 47 and 48) and this Court (pages 4 and 24 of respondent's brief) respondent insists and has always insisted that notice of this entry was sent by the clerk.

A brief review of the established facts of record with regard to notice and the pertinent proceedings in the trial court is imperative. The trial judge without formal motion, hearing or prior notice to respondent (R. 26) did vacate the judgment of May 7, 1940 and reenter same on June 13, 1940, all in violation of the procedure by motion prescribed by Rule 7 (b) of the Federal Rules of Civil Procedure and without any of the basic requirements of due process of law. It was not until June 20th, 1940, after respondent learned of this action against him, that the true facts in this case came to light in the revelation by Clerk Dawson to counsel for respondent that he had prepared notice of the judgment of May 7, 1940 for mailing to the parties. He could not state that he mailed the notice because he never did do the actual mailing at the mail box of any notices. This was customarily done by messenger. Mr. Dawson did all that he customarily has done in similar circumstances except that he failed to place an "N" on the Docket as a note of the mailing, but did place one on the Day Book of Civil Division No. 3, which signified the same that such entry would have meant had it been placed on the Civil Docket.

Respondent files herewith in the Office of the Clerk of this Court a certified copy from the District Court of the United States for the District of Columbia of the Clerk's Memoranda in the Day Book of Civil Division No. 3, which shows this "N" as entered. The certified copy is printed at the end of this petition. If certiorari to correct diminution of the record is necessary, respondent requests that certiorari be directed to the District Court of the United States for the District of Columbia for this purpose or that it be considered as accomplished. This certified copy was not in the court of appeals below, since respondent felt that the motion to reconsider (R. 8) and the affidavit of the clerk (R. 9) was sufficient to show mailing. Petitioner,

although served, had not filed opposition to this motion. However, the Court in its majority opinion overlooked these facts and it may be that this addition to the record will clarify the evidence already before this Court.

Since notice was sent, this failure to place an "X" on the Civil Docket is a correctable clerical error under Rule 60 (a) and is harmless error not supporting the vacating of the judgment under Rule 61.

Upon learning the true facts with regard to notice from the clerk on June 20, 1940, respondent filed a timely Motion to Reconsider Order to Vacate Judgment on June 24, 1940, duly served on petitioner, setting forth the grounds that the reentry proceeding had been conducted without opportunity for respondent to be heard or any due process of law (unprinted Tr. 44-48) and that notice of the entry of judgment of May 7, 1940 had been sent (R. 8 and 9). No opposition was filed by petitioner. The summer recess of the court intervened before the motion was reacheed for hearing. When it was reached in the fall with both parties present it was summarily overruled, for the trial judge had reached a frame of mind where he did not wish to reconsider. He did not allow oral argument or evidence on these questions; he only stated that a trial judge should not have the power to cut off an appellant from an appeal from his decision (Exhibit "B", R. 27). So far as this counsel knows the trial justice does not yet know of the action of his clerk. Although the trial justice orally stated that he did not wish to reconsider, formal order has never been entered and the record of the trial court is still incomplete (R. 1, 2, 3 and 27).

This reentry of the judgment without due process of law and the refusal to reconsider the action did substantial injustice to respondent and was not a sound exercise of judicial discretion.

If it be the intention of the Supreme Court to require notification of a judgment by ordinary mail and notation of notification on the docket as a condition precedent to the finality of a judgment it is respectfully suggested that this court should so rule in specific terms. Otherwise, this very case now in its fifth year may again return to this court on the question of the necessity of notation of notice, and much other litigation is certain to arise concerning the sufficiency of notice. The effect of requiring such notification and notation as a condition precedent to the finality of a judgment is to place the burden on the party relying on a judgment to run down to the court to see that the docket is complete, for he cannot rely on notice of entry of judgment from the court. It is not clear what the Court's position is in the case at bar. If a party relying on a judgment should find the docket complete in every detail and matter of form, what if the party wishing to review a judgment then claims he did not receive the mailed notice? Suppose the mailed notice reached the office of his attorney but he did not see it? Should not the Court, if it deems it fundamentally just that a party should receive notice of a judgment by mail, amend the Federal Rules of Civil Procedure to require notice by registered mail with return receipt and notation on the docket of the return of the receipt and the date of its return, rather than attempt to accomplish this same result by a series of decisions?

This petition for rehearing is presented in good faith and not for delay.

Respectfully,

JOHN B. GUNION,
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1420 New York Avenue, N. W.,
Washington, D. C.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

No. 5003, Civil Action.

BYRD, *Plaintiff*,

vs.

HAWES, ET AL., *Defendants*.

I, Charles E. Stewart, Clerk of The District Court of the United States for the District of Columbia, do hereby certify the annexed to be a true and correct copy of the original Clerk's Memoranda as they appear of record in the Clerk's Office of said Court in the above-entitled cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 19th day of April, 1943.

CHARLES E. STEWART,
Clerk,
By LYDIA M. GARDINER,
Deputy Clerk.

[Seal, District Court of the United States for the District of Columbia.]

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

Clerk's Memoranda.

Friday, April 19, 1940	Civil Div #3	GOLDSBOROUGH, J.
5003	On hearing.	
BYRD	Taken under advisement.	
vs		
HAWES, et al		
H. Lincoln Johnson K. Hawes		

Witnesses

Bertha Byrd	Howard W. Dowling
J. Oliver Hill	Thornton W. Owens
Hartwell F. Tucker	Frances L. Hawes
	White B. McKinley

Tuesday, May 7, 1940	Civil Div #3	GOLDSBOROUGH, J.
5003		
BYRD	Deft.	
vs	Findings of Fact and Conclusions of Law and Decree dismissing Suit signed.	N
HAWES, et al		

Thursday, June 13, 1940	Civil Div #3	GOLDSBOROUGH, J.
5003		
BYRD	Order vacating judgment of May 7, 1940. (2 notified).	
vs	Judgment for defts vs pltf (2 notified).	
HAWES, et al		

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SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1943.

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Petitioner,
vs.
Francis L. Hawes, Individually and as Trustee and Raymond D. Evans, Trustee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 3, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions respecting the rule making power of the United States Court of Appeals for the District of Columbia touching appeals to that court and the powers of the District Court of the United States for the District of Columbia to vacate its judgments.

Rule 10 of the Rules of the Court of Appeals, as it stood when applied in this case, was:

"No . . . judgment . . . of the District Court of the United States for the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within 20 days after the . . . judgment . . . complained of shall have been made or pronounced. . . ."[1]

In the instant case a judge of the District Court, after a hearing on a complaint and answer, on May 7, 1940, signed a judgment dismissing the complaint. The clerk noted the judgment in the docket. This entry, pursuant to Rule 79(a) of the Rules of Civil Procedure, made the judgment effective at the date of entry. (See Rule 58.)

The twenty day period for appeal expired May 27 but no notice of appeal was filed until June 3. Rule 77(d) of the Rules of Civil Procedure imposed on the clerk the duty, immediately upon the entry of the judgment, to send notice of such entry, in the way specified by Rule 5, but it is agreed that no such notice was sent.

[1] February 1, 1941, the rule was amended to substitute a period of 30 days for the 20 days theretofore provided.

June 6 the petitioner filed a motion to enter judgment and to direct the clerk to notify the parties. The reasons stated in support of the motion were that the clerk had failed to enter the day or the month of the judgment as required by the rules of court and had failed to notify the parties. The motion was not acted on until June 24, when the court denied it.

In the meantime, on June 13, the trial judge ordered the judgment of May 7 vacated "for the reason that the clerk failed under Rule 77d. of the Rules of Civil Procedure to serve a notice of the entry of judgment by mail on the plaintiff . . . and to make a note in the docket of the mailing." The same day the judge signed and filed a second judgment in the same terms as that of May 7, which was duly noted in the docket. The petitioner filed a notice of appeal from this judgment on June 14. The respondent moved to dismiss the appeal as taken out of time. The court below granted the motion and dismissed the appeal.[2]

The petitioner urges that the rule of the court below fixing 20 days as the period within which appeal may be taken is contrary to law and that, even though the rule is valid, the appeal was timely because taken within 20 days of the judgment finally entered.

First. We hold that Rule 10 of the Court of Appeals is within the competence of that court. The court was established by the Act of February 9, 1893,[3] which, in § 6, empowered it to "make such rules and regulations as may be necessary and proper for the transaction of the business to be brought before it and for the time and method of the entry of appeals". The Act of July 30, 1894,[4] amended § 6 to read that the court might make "such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court." Both of these statutes were later than the Act of March 3, 1891,[5] which created circuit courts of appeals and provided for appeals to such courts within six months after the entry of judgment. The Judicial Code adopted March 3, 1911,[6] did not alter or enlarge the provisions of the Act of March 3, 1891, *supra*.

[2] 132 F. 2d 569; 76 U. S. App. D. C. 308.
[3] C. 74, 27 Stat. 434.
[4] C. 172, 28 Stat. 160.
[5] C. 517, § 11, 26 Stat. 826, 829.
[6] 36 Stat. 1087.

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In *Ex parte Dante*, 228 U. S. 429, decided April 28, 1913, this court affirmed the validity of Rule 10. This decision necessarily imports that the statute conferring power on the Court of Appeals to set the time for appeal was not superseded by the legislation creating and defining the jurisdiction of circuits courts of appeals. No reference is made to the United States Court of Appeals for the District of Columbia in Sec. 8(c) of the Act of February 13, 1925, which reduced to three months the time within which to take appeals to the circuit courts of appeals.[7] The Federal Rules of Civil Procedure have not altered statutory provisions respecting the time for taking appeals from district courts. It follows that the court below possesses the statutory power to set the time within which an appeal from the District Court must be taken.

Second. It goes without saying that the District Court could not extend the period fixed by Rule 10. The respondent urges that the vacation of the judgment of May 7, and the entry of a new judgment on June 13, amounted merely to an attempted extension of the time for appeal; that judgment was duly entered and became final on May 7; that the clerk's neglect to comply with Rule 77(d) in the matter of notice does not affect its validity or its finality, and that the notice of appeal of June 14 was consequently out of time and the court below properly dismissed the appeal on that ground. We cannot agree.

It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60(a)(b).) These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied

[7] C. 229, 43 Stat. 936, 940.

upon the provisions of Rule 77(d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause.

The judgment is reversed and the cause is remanded to the court below for further proceedings in conformity with this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1943.

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Petitioner,
vs.
Francis L. Hawes, Individually and as Trustee and Raymond D. Evans, Trustee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 3, 1944.]

Mr. Chief Justice Stone, dissenting.

I do not understand that the Court rests its decision on the ground that Rule 77(d) of the Rules of Civil Procedure makes notice of entry prerequisite to the finality of the judgment for purposes of appeal. If it does, most else that is said is unnecessary to the decision. In any case what is said seems to me to be untenable in principle and without support in authority.

To say that a district court can rightly extend the prescribed time for taking an appeal by the reentry, pro forma, of a final judgment after the time to appeal from it has expired, is to disregard considerations of certainty and stability which have hitherto been considered of first importance in the appellate practice of the federal courts. It is to sanction the regulation of the time for appeal by courts, contrary to the appeal statute, and without support in law or any rule of court. Rule 60, which permits amendment of the judgment or relief of a party from it, in circumstances not here present, gives no warrant for enlarging the time for appeal by reentry of a judgment which is not amended and from no part of which any party has been relieved.

In the federal courts there is no right to appeal save as it is granted by Congress or a rule of court which is authorized by Congress and has the force of law. See *Heike* v. *United States*, 217 U. S. 423, 428; *Ex parte Dante*, 228 U. S. 429, 432. It is in the public interest, and it is the very purpose of limiting the period

for appeal, to set a definite and ascertainable point of time when litigation shall be at an end unless within that time application for appeal has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. *Matton Company* v. *Murphy*, 319 U. S. 412, 415.

That purpose is defeated if judges may enlarge the time for appeal beyond the period prescribed by law, whether by an order purporting directly to extend it or by reentry, without change, of a judgment which has already become final. It is for that reason that this Court has consistently ruled that no federal judge or court possesses the power to extend the time for appeal beyond the statutory period by any form of judicial action which falls short of a reconsideration of the provisions of the judgment in point of substance so as to postpone its finality.

The decisions are numerous and diligence of court and counsel has revealed no exceptions. *Credit Company* v. *Arkansas Central Ry.*, 128 U. S. 258, is representative of the unbroken current of authority. There, in dismissing an appeal as untimely the Court, speaking by Mr. Justice Bradley, said at page 261: "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter".

At the last term of Court we held that the reentry of its final judgment by a state appellate court, with only formal changes not affecting any matter adjudicated, did not enlarge the time to appeal to this Court. *Department of Banking* v. *Pink*, 317 U. S. 264. And at the same term we held that a motion to amend a final judgment would not toll the time for appeal unless the amendments proposed were of substance rather than form, *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205-6—an inquiry which presupposed that reentry of the judgment without formal change could not enlarge the time. To the same effect are *Pfister* v. *Finance Corp.*, 317 U. S. 144, 149-51; *Zimmern* v. *United States*, 298 U. S. 167. And in *Wayne Gas Co.* v. *Owens*, 300 U. S. 131, 137, this Court, citing *In re Stearns & White Co.*, 295 Fed. 833; *Bonner* v. *Potterf*, 47 F. 2d 852, 855; *United States* v. *East*, 80 F. 2d 134, 135, declared that where it

appears that a rehearing has been granted only for the purpose of extending the time of appeal, the appeal must be dismissed — a statement equally applicable to the reentry of the judgment solely for that purpose.

Petitioner, by the exercise of the diligence required by the Federal Rules of Civil Procedure could have learned of the entry of the judgment against him and have taken a timely appeal. His case is not hard enough to afford even the proverbial apology for our saying that federal judges, by the reentry of a judgment for no other purpose, are free to make a dead letter of the statutory limit of the period for appeal.

Mr. Justice MURPHY concurs.